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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 476.

JOHN ELMER WOODARDS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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APPENDIX A.

OPINIONS AND ORDERS BELOW.

Opinion of the Supreme Court of Ohio, Case No. 39,248.

Syllabus by the Court.

1. Where, during the investigation of a crime, a person not yet charged with the commission of such crime is informed prior to being interrogated by a deputy sheriff and an assistant prosecutor that he is not required to make any statement, and that any statement which he might make may be used against him, and where he has not requested that counsel be provided, such person has not been denied the assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution.

2. Ordinarily, in an appeal in a criminal case, no claim of error may be predicated upon alleged irregularities in the proceedings at the trial where defendant knew of such alleged irregularities in sufficient time to bring them to the attention of the trial court, or where defendant, at his trial, has acted in a manner inconsistent with the position taken upon appeal with regard to such alleged irregularities.

3. The fact that a person selected to serve as a juror at the trial of one charged with murder in the first degree is acquainted with the sheriff and a deputy sheriff who was a witness for the prosecution and has procured an insurance policy for that witness does not prejudice defendant's right to a fair and impartial trial, where the opportunity was present for defendant's counsel to ascertain this fact, and where there is no evidence that the juror was prejudiced against the defendant by reason of such acquaintance.

4. The admission into evidence of statements in a death certificate or a coroner's report that the decedent

was beaten by an unknown assailant or that there was extensive beating involving the entire body does not constitute prejudicial error, where there is testimony as to the condition of decedent's body at the time of death and as to the cause of death, and where such statements in the documents do not connect the defendant with the death of the decedent. (*Carson v. Metropolitan Life Ins. Co.*, 156 Ohio St. 104, 100 N. E. 2d 197, distinguished.)

On Saturday, July 13, 1963, Margaret Van Arsdale, a woman 85 years of age, was discovered dead in the utility room of her home in Columbia Station, Ohio. A blanket was wrapped around her body and tied with her nightclothes and underclothes.

An autopsy showed that all her ribs had been broken, her spleen ruptured and her perineum and vaginal wall torn. She had suffered injuries to her head, left forearm, right hand and other parts of her body.

About noon on July 13, 1963, two sheriff's cars were dispatched to the residence of John Woodards, a former tenant of the victim. No one was at home. A deputy entered the house and took a pair of work boots which he placed in his car. Shortly thereafter, Woodards arrived and was arrested by the officers. He was informed that he was wanted for questioning in connection with a gas station robbery which had occurred the night before.

One of the deputies accompanied Woodards into his house where Woodards identified and gave to the deputy the clothes which he said he had been wearing the night before. He was then taken to the county jail. The deputy later returned for more clothing which Woodards' wife gave him.

Woodards was questioned briefly, was fingerprinted on July 13 and was held in jail on Monday, July 15, at

about 1:15 p.m., he was questioned for the first time concerning the murder of Mrs. Van Arsdale. At that time, he was informed by a deputy sheriff that he was not required to make any statement and was advised by an assistant prosecutor of his federal and state constitutional rights, including the fact that any statement he might make could be used against him.

The deputy in charge of the interrogation read to Woodards from a book on the subject of sexual deviations of older women and asked him whether he did not want to relieve the load on his shoulders. Woodards then made a statement which the court reporter transcribed. He agreed to go to the Van Arsdale residence and re-enact the incident. During the drive to and from the scene, he was questioned, and the questions and answers were taken down in shorthand by a deputy sheriff. Upon their return to the jail, Woodards was taken before a magistrate at the Elyria Municipal Court and charged with first degree murder. On July 16, he was represented by counsel, waived preliminary hearing and was bound over to the Grand Jury.

On July 23, he was indicted for first degree murder, arraigned on July 26, at which time he was represented by counsel, and pleaded not guilty.

Prior to trial, Woodards was twice examined at Lima State Hospital and was found to be legally sane.

At his trial before a jury, Woodards testified in his own behalf as to the events which took place on the night of July 12, 1963.

His testimony was that he had previously been a tenant in the upstairs apartment of Mrs. Van Arsdale's house, and, after he and his wife had moved, he had periodically returned to visit Mrs. Van Arsdale. He testified that upon several previous occasions he had had sexual intercourse with her.

He testified that on July 12, 1963, he had been away from home all day and had drunk several beers and some wine during the course of the day. In the evening he went to several bars and drank approximately 17 bottles of beer.

He stated further in his testimony that at about 1:00 a.m. he decided to return home and on his way he passed the Van Arsdale residence. He noticed that the lights were on and decided to stop. He parked his car in a field about a quarter of a mile down the road, walked back to Mrs. Van Arsdale's home and knocked on the door. He testified that Mrs. Van Arsdale admitted him. He stated that they talked for a few minutes. He said that he then helped her onto the kitchen table and they had intercourse. The table tipped, and both he and Mrs. Van Arsdale fell on the floor. He testified that he put out his elbows to break the fall and they hit her chest. He stated that he became frightened and got up immediately and put the table back in place. According to his testimony he then picked Mrs. Van Arsdale up and carried her into the living room to see whether she was hurt. After this, he dragged her into the utility room, wrapped her in a blanket and tied it around her with her nightclothes and underwear. He left the premises, went home and went to bed.

He testified that he did not injure her purposely or wilfully, and that he did not realize that she was dead when he left.

On the witness stand he stated that the next morning he went shopping with his wife. He remembered nothing of the night before and did not, in fact, remember what had happened until July 15th when he was questioned.

The jury convicted him of murder in the first degree without recommendation of mercy.

The trial court denied defendant's motion for new trial.

Upon appeal, the Court of Appeals affirmed the judgment of conviction.

This cause is before this Court upon an appeal as of right and upon the allowance of a motion for leave to appeal.

O'NEILL, *Judge.*

Errors are assigned as follows:

(1) Two purported confessions of defendant were obtained in violation of his right to the assistance of counsel and were improperly used against him at trial.

(2) Various items were seized incident to an invalid arrest and were improperly admitted into evidence.

(3) Defendant was forced to wear handcuffs and body belt during the trial and was heavily guarded, and the trial court failed to keep order during the course of the trial.

(4) The foreman of the jury failed to reveal on *voir dire* that he was the insurance agent of the sheriff and of a deputy sheriff who was a witness for the prosecution.

(5) Certain items other than those obtained as the result of an unreasonable seizure were improperly admitted into evidence.

(6) Inflammatory statements and the use of items not introduced into evidence were improperly permitted by the trial court during the summation by the prosecutor.

(7) The jury was erroneously charged on the lesser included offense of manslaughter.

(8) The trial court refused to define the word, "psychopath," after the jury had requested such definition.

The first assignment of error is based upon an alleged denial to the defendant of his right to counsel under the

Sixth and Fourteenth Amendments to the United States Constitution.

In Section 2935.14, Revised Code, it is provided in part:

> "If the person arrested is unable to offer sufficient bail or, if the offense charged be a felony, he shall, prior to being confined * * * be speedily permitted facilities to communicate with an attorney at law of his own choice, or to communicate with at least one relative or other person for the purpose of obtaining counsel * * *."

In *Escobedo v. State of Illinois,* 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, the United States Supreme Court held that where an investigation had focused upon a particular suspect who had been taken into custody and interrogated in a manner lending itself to incriminating statements, where the accused had requested and been denied an opportunity to consult with counsel, and where he had not been effectively warned of his right to remain silent, he was improperly denied "the assistance of counsel" to which he was constitutionally entitled.

Under Ohio law, the accused must be permitted to communicate with counsel or a relative, or the officers must contact someone for him for the purpose of obtaining counsel irrespective of whether the police effectively warn him of his absolute right to remain silent. *City of Toledo v. Dietz,* 3 Ohio St. 2d 30, 209 N. E. 2d 127, certiorari denied, 382 U. S. 956, 86 S. Ct. 432, 15 L. Ed. 2d 360.

It appears from the record that the defendant did not request counsel and was not denied an opportunity to consult with counsel. It appears further from the record that he was advised by an assistant prosecutor and by the deputy in charge of the interrogation that he was not required to make any statement, and that any statement he might make could be used against him.

The defendant, when he testified in his own behalf, did not controvert the testimony of three deputy sheriffs to this effect. Since the defendant testified that he had gone to the victim's home and had intercourse with her, and that she had been injured when the two of them fell from a table, he waived any objection he might have made to the testimony of the prosecutor's witness with regard to the confessions which he made while he was being interrogated prior to being charged with murder. *Blanchard v. State* (Miss.), 184 So. 66; *State v. O'Neal,* 210 S. C. 305, 42 S. E. 2d 523; *State v. Smith,* 140 Me. 255, 274, 37 A. 2d 246; *Jordon v. Maxwell, Warden,* 3 Ohio St. 2d 115, 209 N. E. 2d 213; *Wigmore on Evidence* (3 Ed.) 129, Section 18, note 35; *McCormick on Evidence,* 344, Section 55. Contra, *Commonwealth v. Noble,* 371 Pa. 138, 146, 88 A. 2d 760.

He also introduced the testimony of his own doctor, who repeated what defendant had told him concerning what happened when he went to Mrs. Van Arsdale's home during the night of July 12.

Due process of law does not require that defendant be permitted to give his version of the event while having previous statements which he made excluded from the trial.

Defendant assigns as error the introduction into evidence of several articles of clothing allegedly seized illegally by the deputy sheriff who went with him into his home. The claim is not that the search was unreasonable, but rather that it was not incident to a valid arrest. The assertion of invalidity is based upon the lack of probable cause for arrest, the failure to obtain a warrant, and the failure to inform defendant of the charge against him.

An arrest under Ohio law and under the United States Constitution must be based upon reasonable cause or

probable cause. Section 2935.04, Revised Code; *Beck v. State of Ohio*, 379 U. S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142. In *Beck, supra*, at page 96, 85 S. Ct. at page 228, the court stated:

> "When the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief' that an offense has been committed." These facts must not be from so vague and untested a source as would require a judicial officer to deny the warrant. *Wong Sun v. United States*, 371 U. S. 471, 479, 83 S. Ct. 407, 9 L. Ed. 2d 441.

Under certain circumstances, a warrant need not be obtained in order to render an arrest valid. The arresting officer must have probable cause to believe that a felony was committed by defendant, and the circumstances must be such as to make it impracticable to secure a warrant. *Johnson v. United States*, 333 U. S. 10, 68 S. Ct. 367, 92 L. Ed. 436; *Jones v. United States*, 357 U. S. 493, 499, 500, 78 S. Ct. 1253, 2 L. Ed. 2d 1514; *Chapman v. United States*, 365 U. S. 610, 615, 81 S. Ct. 776, 5 L. Ed. 2d 828.

In the instant case, the officers had probable cause to suspect the defendant of the offense which had been committed. It was within their knowledge that (1) the assailant must have been known to the victim, since there was no sign of forcible entry; (2) it was an offense of a violent nature; (3) the defendant was known to the victim, having rented her upstairs apartment and had a previous record, including sexual offenses; and (4) he was a large and powerful man and was known to have a violent temper.

This was not the untested hearsay statement of an unreliable informant but was based upon personal observation of the premises, conversation with the victim's

granddaughter, who had known the victim and the defendant, and the personal knowledge of the officers.

In this case, the failure to obtain a warrant was not unreasonable. The officers could not know whether defendant would attempt an escape. In fact, they knew that he had previously left the state to avoid arrest pursuant to a warrant and had not returned until the charges were dropped. Therefore, proceeding without a warrant was justified.

Defendant was not arrested for murder, but rather for robbery, and was not informed of the real charge against him. This point as well as the other purported illegalities in the arrest were not raised prior to or during the trial, or before the Court of Appeals.

Although this Court does have discretion to review a claimed denial of constitutional rights not raised below, under Section 2505.21, Revised Code, that discretion will not ordinarily be exercised to review such claims, where the right sought to be vindicated was in existence prior to or at the time of trial. *Mapp v. Ohio,* 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 and *Ker v. California,* 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726, which apply to the states federal standards of reasonableness and probable cause in determining the validity of arrests, searches and seizures, do not preclude the operation of reasonable state procedures. Those cases were decided prior to the trial of this case. There was, therefore, no reason for not raising the question of the validity of the arrest and the search and seizure by motion to suppress prior to trial or objection at trial.

It appears from the record that the only items which were the subject of a search and seizure at the time of the arrest were defendant's clothes, shoes and handkerchief. However, several of the items allegedly seized illegally

were introduced into evidence by defendant and he identified several of the state's exhibits on direct examination.

Since defendant did not raise this question at the first opportunity, in fact, introduced several of the items himself, and identified certain of the state's exhibits without objection, he may not now assert that this was to his disadvantage. *State v. Davis*, 1 Ohio St. 2d 28, 203 N. E. 2d 357.

Defendant alleges as error that the foreman of the jury did not reveal the full extent of his acquaintance with the sheriff and one of his deputies, a witness in this case.

On *voir dire*, the juror stated that he knew the sheriff and deputy Lois Carson casually, not personally, just by meeting them. After trial, it was learned that the juror had procured an insurance policy for the deputy. It appeared from affidavits of the juror and the deputy that the transaction took place by mail and telephone and was not the result of solicitation by the juror, and that affiants knew each other "casually."

It does not appear that there was any attempt on the part of the juror to conceal the nature of the relationship. He admitted knowing both the sheriff and the deputy. Counsel for defendant contends that the juror should have answered, "business," rather than, "casual," when he was asked the nature of his acquaintance with the sheriff and deputy. However, Section 2945.25, Revised Code, does not specify either "business" or "casual" acquaintance with a witness as a challenge for cause, and the fact that a juror is acquainted with a witness would not necessarily affect the juror's impartiality. See *People v. Wilkes*, 44 Cal. 2d 679, 284 P. 2d 481.

It is provided by Section 2945.27, Revised Code, that the court shall examine prospective jurors, with reasonable examination to be allowed to the prosecutor and

counsel for the defense. The nature of the relationship between a witness and a juror would seem to fall within the scope of reasonable examination, and counsel does not claim that there was any limitation on his right to examine the juror. Counsel has an obligation to help discover, by examination, those facts which would make a juror unsuitable to serve in a particular case.

Defendant alleges further as error that five muscular uniformed deputies guarded him, that he was forced to wear handcuffs fastened to a body belt during the trial, and that the trial court failed to keep order throughout the trial. The record indicates that there were five deputies discreetly stationed at various points in the courtroom, and that two of them were in plain clothes. There is nothing in the record to indicate that the trial was disorderly.

The record does, however, show that defendant was handcuffed throughout the trial, and that objection was made thereto prior to the commencement of the trial. Ordinarily a prisoner is entitled to appear free of shackles or bonds which would restrict his free movements. It is uniformly held, however, that the prisoner may be shackled when such precaution is shown to be necessary to prevent violence or escape. It lies within the discretion of the trial court to determine such necessity, based upon the conduct of the accused. An appellate court will not reverse the trial court's action except in case of an abuse of that discretion. *Tunget v. Commonwealth,* 303 Ky. 834, 198 S. W. 2d 785, certiorari denied, 331 U. S. 833, 67 S. Ct. 1514, 91 L. Ed. 1847; *State v. Coursolle,* 255 Minn. 384, 97 N. W. 2d 472, 75 A. L. R. 2d 755.

The trial court in the instant case ruled that the handcuffs and belt should not be removed, stating that it was up to the sheriff to decide. During the trial, evidence was

presented that, while defendant was confined in the county jail, a one-inch piece of hacksaw blade, a piece of old shirt used as a belt, a pencil, a metal cleat from his shoe, a key and a five-dollar bill were found in defendant's cell. Furthermore he pleaded not guilty by reason of insanity. These are valid reasons for refusing to unshackle the defendant during the trial. There was not an abuse of discretion on the part of the trial court.

Objection was timely made to the admission of the autopsy report and the death certificate into evidence. These documents were objected to on the ground, among others, that they contained conclusions and opinions of the person who filled them out as to the cause of death. In the death certificate, the conclusion to which objection was made was "extensive beating involving the entire body," and in the autopsy report, the objectionable statement was, "beaten by unknown assailant."

In *Carson v. Metropolitan Life Ins. Co.*, 156 Ohio St. 104, 100 N. E. 2d 197, 28 A. L. R. 2d 344, an insured died and beneficiaries brought suit to recover certain funds payable under a policy of life insurance. In case of suicide, the company was not obligated to pay. The issue was whether a coroner's report and death certificate containing conclusions and opinions as to the cause of death could be admitted into evidence.

The court held that while Section 2855-11, General Code (Section 313.10, Revised Code), makes the records of the coroner admissible, admissibility is limited to the facts contained therein. The court states, at page 114, 100 N. E. 2d at page 203:

> "* * * But, in the absence of any direct testimony as to suicide, an expression by a coroner or physician that a decedent committed suicide is a mere opinion and does not constitute a fact as con-

templated by the provisions of the statutes to which we have referred. That the admission of such opinions was prejudicial cannot be doubted."

In the instant case, there was extensive testimony, without objection, as to the cause of death. The deputy coroner who performed the autopsy on the body of the victim testified, without objection, that the injuries were caused by "external violence applied to multiple areas of the body." His opinion was that the injuries could not have been caused by one blow or by a fall or by defendant falling upon the victim. On cross-examination by defendant's counsel he testified that the injuries were produced by crushing blows with a critical localization of weight.

This was the professional opinion of one who had observed the body of the victim at great length. Such opinion was based upon examination of the condition of the body and the probability as to the cause of such condition. In *Carson, supra* (156 Ohio St. 104, 100 N. E. 2d 197), the opinion of the coroner in the coroner's report and death certificate went further than the opinion in the documents in this case. There, the opinion stated not only what caused the death, but who caused it. It was this latter aspect of the opinion which created the prejudice. In the instant case, since there was extensive testimony by witnesses, and since the documents did not name the assailant, their admission was not prejudicial error.

Objection was also timely made to the admission of 15 slides taken during the course of the autopsy. The rule is well settled that photographs and color transparencies are not objectionable so long as they are properly identified, are relevant and competent and are accurate representations of the scene which they purport to portray. Indeed, photographs frequently convey information to the court and jury more accurately than words. *Oliver v. State*, 225

Ark. 809, 286 S. W. 2d 17; *Vaca v. State*, 150 Neb. 516, 34 N. W. 2d 873.

Although a photograph may be rendered inadmissible by its inflammatory nature, the mere fact that it is gruesome or horrendous is not sufficient to render it inadmissible if the trial court, in the exercise of its discretion, feels that it would prove useful to the jury. *People v. Brubaker*, 53 Cal. 2d 37, 346 P. 2d 8; *People v. Jenko*, 410 Ill. 478, 102 N. E. 2d 783; *Commonwealth v. Novak*, 395 Pa. 199, 150 A. 2d 102.

The real question is whether the probative value of such photographs is outweighed by the danger of prejudice to the defendant. See *Wisnewski v. State*, 1 Storey 84, 51 Del. 84, 138 A. 2d 333. But see *People v. Jackson*, 9 Ill. 2d 484, 138 N. E. 2d 528; *Kiefer v. State*, 239 Ind. 103, 153 N. E. 2d 899.

This Court cannot say that the admission of the color slides prejudiced defendant's right to a fair trial or that the trial court abused its discretion in admitting them into evidence.

Defendant alleges as error the reference by the prosecutor to previous arrests and convictions of defendant. Evidence of previous convictions may be introduced for the purpose of impeaching credibility. Section 2945.42, Revised Code; *Harper v. State*, 106 Ohio St. 481, 140 N. E. 364.

This objection was waived by defendant by the introduction of the following testimony of his own expert witness, Dr. Friedman:

> "It was significant, and this we learned from him directly, that early in his development, at the age of 14 he had been arrested for robbery. I think he called it breaking and entering, but because of his youth, he was placed on probation at the time.

"There were also other arrests for various anti-social offenses, peeping tom activity, assaulting a girl, and so on. So that by the age of 17, he had already been arrested three or four times."

This illustrates defendant's previous record more clearly than any testimony elicited by the prosecutor.

Defendant complains that he was prejudiced by the following argument of the prosecutor in his summation to the jury:

"I have used this before, he is faking. Remember ladies and gentlemen of the jury, we have confidence in you that they will not be able to fraudulently present to you something that did not happen or that there is a different version of what actually happened."

And the prosecutor stated further:

"* * * Woodards is a misfit like a gangrenous leg on a diabetic body, like an inflamed, useless appendix that threatens the body, the body and the society of the state of Ohio.

"He caused a cruel, unnecessary death. He asks mercy from you. Yet, he showed none.

"Remove him from society like you would a parasite * * *."

In *State v. Muskus,* 158 Ohio St. 276, 109 N. E. 2d 15, 33 A. L. R. 2d 452, the court held that an appeal to the pecuniary interest of the jurors as taxpayers was improper and that the refusal of the trial court to sustain objections to such argument was prejudicial error. There the prosecutor appealed at length to the passions and prejudices of the jury in most inflammatory language. The language complained of here does not approach the scope or violence of the language used there.

Although the statements of the prosecutor were intemperate and might better have been left unsaid, some latitude and freedom of expression should be allowed. *People v. Allen*, 351 Mich. 535, 88 N. W. 2d 433. The jury should be given credit for sufficient common sense and sound judgment to discount the remarks made in this case. Likewise, there is nothing in the record to show that defendant thought the argument was improper at the time, since there was no objection to it.

During his summation, the prosecutor, arguing in support of the circumstantial evidence of rape, used, for purposes of demonstration, a bottle, a straw, a pen, a dowel, and a pair of calipers. These items had not been introduced into evidence and objection was made to their use. The court allowed their use for demonstration purposes only.

The cases in this area of visual aids not introduced into evidence deal primarily with the use of blackboards and charts. See *Affett v. Milwaukee & Suburban Transport Corp.*, 11 Wis. 2d 604, 106 N. W. 2d 274, 86 A. L. R. 2d 227; *Caley v. Manicke*, 24 Ill. 2d 390, 182 N. E. 2d 206.

It is difficult to perceive a substantial difference between a blackboard or chart and other graphic illustrations of an idea which is being legitimately advanced by counsel. It would be permissible for counsel to call upon the jury to imagine such an illustration, and there is no harm in allowing counsel to present his point in a more concrete manner.

The defendant claims that, in giving the charge on manslaughter, the trial court incorrectly stated the law, and that such error is prejudicial.

That portion of the charge about which defendant complains is as follows:

> "The law of Ohio says that whoever unlawfully kills another is guilty of manslaughter. The killing

may be either upon a sudden quarrel or unintentionally while the slayer is engaged in some unlawful act.

"You will observe that manslaughter need not be done purposely or maliciously and that the element of attempting to perpetrate rape is also lacking.

"If you are convinced beyond a reasonable doubt that the defendant unlawfully killed Margaret Van Arsdale, without purpose to kill her, without malice, and without attempting to perpetrate rape, then your verdict may be guilty of manslaughter."

This charge, because of its incompleteness and imprecision, is ambiguous and, therefore, erroneous. However, the majority of this Court is of the opinion that, upon the record and circumstances of this case, this charge was not prejudicial to the defendant.

The defendant makes no complaint concerning the charge of the court to the jury on first degree murder. The trial court instructed the jury that only if the jury found the defendant not guilty of murder in the first degree should it consider the lesser included offenses. The defendant makes no objection to this charge. The jury found the defendant guilty of murder in the first degree and the evidence in the record is sufficient to support such a jury verdict.

The syllabus of *State v. Loudermill*, 2 Ohio St. 2d 79, 206 N. E. 2d 198, is not applicable. In that case, both the defendant and the prosecutor requested a charge on the lesser included offense of manslaughter. In this case, no request was made by either party for a charge to be given upon the offense of manslaughter, and the defendant takes the position that the court was required by the evidence to give such a charge.

After the jury had retired to consider the verdict a note was sent to the trial judge requesting, among other

things, that he define the word, "psychopath." The judge referred the jury to the testimony of the doctors as they had given such definition. Counsel for the prosecution and the defense agreed to the answers which the court gave to the jury's questions. There can, therefore, be no claim of error predicated upon the trial court's answer to the jury.

This Court, finding no error in the record prejudicial to the rights of the defendant, affirms the judgment of the Court of Appeals.

Judgment affirmed.

TAFT, *C.J.*, and ZIMMERMAN, MATTHIAS, HERBERT, SCHNEIDER and PAUL W. BROWN, *JJ.*, concur.

OPINION OF THE COURT OF APPEALS FOR THE NINTH JUDICIAL DISTRICT OF OHIO, CASE NO. 1627.

Before: HUNSICKER, *Presiding Judge,* and DOYLE and [illegible]RTL, *Appellate Judges.*

HUNSICKER, *P.J.*

This is an appeal on questions of law from a judgment of guilty of murder in the first degree without recommendation of mercy, rendered on the verdict of a jury.

In midmorning of Saturday, the 13th of July, 1963, a neighbor of Margaret Van Arsdale found her lying dead on the floor of her home, located in Columbia Station, Lorain County, Ohio. Mrs. Van Arsdale was a widow eighty-five years of age, and of slight physical build; her weight was about one hundred pounds. She lived alone in the lower rooms of a house, the upper rooms of which were arranged for rental purposes.

The sheriff of Lorain County, Ohio, was notified by the neighbor who found the body. Several deputies were directed by radio to go to the home of Mrs. Van Arsdale, where they discovered the unclothed body of Mrs. Van

Arsdale wrapped in a blanket, her feet and body tied with some underclothing. The pantry, kitchen, and bedroom of the home were in disarray. Blood was on the bed; blood was on the kitchen table and floor; and blood was on the body and blanket.

The coroner was notified, and in response to that notification, one of his deputies came to the home, determined that Mrs. Van Arsdale was dead, and had her body removed to a hospital, where an autopsy was performed.

The autopsy showed a body that was severely beaten; all of the ribs were broken, the vaginal organs were torn, the spleen split into two parts; and injuries to the head, hands, and other parts of the body, were also found.

In the early afternoon of July 13, 1963, a former renter of the upstairs living quarters of the Van Arsdale home, (the appellant here, John Elmer Woodards), was taken into custody. On the 15th day of July, 1963, he gave a complete account of his entering the Van Arsdale home late on the night of July 12, or early in the morning of July 13. He was admitted to the home by Mrs. Van Arsdale, and, according to his story, proceeded to have, or attempted to have, sexual relations over the protests of Mrs. Van Arsdale. He said he tried the act on the bed but was not successful. He then carried his victim to the kitchen, and put her on a table from which she slipped, and then, falling with her to the floor, he continued his act. Noticing she was injured, he wrapped her in a blanket, tied her with some of her clothing, and then went to his home.

At his home, John Elmer Woodards (a two hundred pound, twenty-five year old man), slept soundly, lying next to his wife until midmorning, when he went shopping with her. Upon his return from the grocery store, he was requested to go with a deputy to the jail for questioning.

While there over Sunday, July 14, he was fingerprinted, but was not interrogated until the next day, a Monday, when he, (without coercion, threats, intimidation, promises, or physical abuse), told the story of the events of the previous Saturday. He was taken by the sheriff, and three deputies, to the Van Arsdale home to explain his story. He was told he need not give a statement, but, if he did, it could be used against him. He did not request a lawyer, although at the time set for the preliminary hearing in the Municipal Court of Elyria, Ohio, which hearing was waived, he had counsel of his own choice. From that time on, he was represented by counsel. He was continually in custody from the time he left his home with the deputy sheriff just after noon of July 13.

A lengthy trial resulted in the verdict and judgment set out above. From such judgment, an appeal was duly perfected to this court, wherein the following assignments of error are set forth:

"1. That the judgment of the Common Pleas Court as rendered on 1/31/64 and the order of the Common Pleas Court overruling appellant's Motion for a new trial rendered on 3/9/64 are contrary to law;

"2. That the judgment of the Common Pleas Court rendered on 1/31/64 and the order of the Common Pleas Court overruling appellant's Motion for a new trial rendered on 3/9/64 are against the manifest weight of the evidence;

"3. That the Common Pleas Court erred in overruling objections of appellant and in permitting the Sheriff of this county to keep appellant handcuffed and shackled throughout the entire conduct of this trial, to the prejudice of this appellant;

"4. That the Common Pleas Court erred in permitting the Prosecutor to introduce and to display to the jury colored autopsy slides of the postmortem as conducted by the Lorain County Coroner's office on

the body of Margaret Van Arsdale, to the prejudice of this appellant and his constitutional rights;

"5. That the Common Pleas Court erred in admitting the death certificate as prepared by the Lorain County Coroner without first deleting therefrom the Coroner's opinion as to the cause of death;

"6. That the Court erred in its charge to the jury, especially in charging and defining the included offense of manslaughter;

"7. That the Court erred in permitting the Prosecuting Attorney to present improper final arguments in which said Prosecuting Attorney used as demonstration certain physical items which had not been introduced as evidence and certain inflammatory remarks to the prejudice of the appellant;

"8. That the Court erred in failing to grant appellant's Motion for a new trial or to mitigate sentence for the reason that the jury failed to take into consideration the testimony of Drs. Friedman and Gill, to the effect that the appellant was psychopathic and the testimony that appellant was intoxicated in mitigation of the offense as charged;

"9. That the Court erred in failing to grant a new trial for the reason that one juror failed to reveal on voir dire examination that said juror was acquainted with and was the insurance agent for Deputy Lois Carson, who was an important witness for the prosecution;

"10. That the Court erred in failing to define the word 'psychopath' when especially requested by the jury during their deliberations, said word having been insufficiently defined in the Court's charge;

"11. That the Court erred in failing to grant appellant's Motion for a new trial for the reason that the essential element of intent was not proven beyond a reasonable doubt;

"12. That the Court erred in the admission of evidence over objection of appellant;

"13. That the Court erred in failing to maintain proper order during the trial of this cause and to control the conduct of the trial;

"14. That the Court erred in permitting the Sheriff at all times to keep at least five huge, uniformed deputies in obvious presence in the courtroom and surrounding appellant;

"15. That the Court erred in permitting the State to introduce evidence of other offenses of appellant having no relation to the offense for which appellant was on trial;

"16. That the indictment in this cause was defective in that it contained alternative allegations;

"17. Other errors manifested by the record."

First, we turn to assignment of error number three, and the claim that the appellant was prejudiced by being handcuffed throughout the trial. Counsel for Woodards, at the outset of the trial, requested the court to order the sheriff to remove the handcuffs, and unfasten the lock by which his handcuffs were attached to his belt. The trial judge said it was a matter of security which remained in the control of the sheriff.

The bill of exceptions shows that Woodards, after being in jail, secured from some unknown place a small piece of a hacksaw, a metal key which he attached to a string, and another small piece of metal. He said he found the piece of hacksaw, and metal, in the window well of the jail, and brought the key with him from Lima State Hospital. He also had pleaded guilty by reason of insanity. Under these circumstances, although the deputy sheriff may have been unduly fearful of an attempt to escape, which fear was shared by the judge, the keeping of Woodards handcuffed, in the light of all of the facts introduced in the case, cannot be called prejudicial to his rights.

The control of the proceedings during trial rests with the trial judge, and he must determine whether a prisoner who appears before him should remain manacled during trial. *State v. Farmer,* 90 O. App. 49. Any error committed by the trial judge in this regard was not prejudicial in the instant case.

With regard to appellant's claim of error respecting the keeping of "five huge, uniformed deputies" in the courtroom during the trial, and in failing to maintain proper order during the trial; we find no such matters exemplified in the bill of exceptions.

The introduction into evidence of other offenses was testified to by Mrs. Woodards, and by the appellant himself. This testimony concerning these offenses related to convictions for misdemeanors. No prejudicial error is found in the admission of such testimony herein.

The man who became foreman of the jury was inquired of, on voir dire, as to his acquaintance with the sheriff and one of his deputies. The juror said it was casual, and no further inquiry was made of this juror. After the trial, it developed that this juror had sold, at the request of the deputy, a liability insurance policy similar to one he had sold the sheriff. Later, this deputy testified to statements made by Woodards in her presence, and which she took by shorthand during a ride with him to the scene of the crime. Another deputy also testified to the same statement. There is nothing to show prejudice in the selection of this juror, or that his acquaintance with the deputy was other than what he said it was. If counsel had desired to find out how casual a "casual" acquaintance is, he could have inquired further. *Conrad v. Kerby,* 66 O. App. 359.

The jury in the course of their deliberations, requested, in writing, among other things, a definition of

"psycopath" (sic). One of the psychiatrists, in his testimony, was asked to give such definition, which he did. Other doctors who testified also gave a definition of "psycopath" (sic). The instructions of the trial judge to the jury were, at the request of the prosecutor, reduced to writing, and sent to the jury room. The trial judge told the jury, in answer to their request, to "recall the testimony of the medical doctors as they gave such definition." Under the circumstances here, the trial judge was bound by the provisions of Section 2315.01(G), Revised Code. No error prejudicial to the rights of the appellant is found here.

A psychotic person is not an insane person, as detailed by the doctors. The jury had before it a complete analysis of mental deviations and mental illnesses. We must assume they evaluated such testimony. There is no way to show they failed to consider it. Assignment of error number eight must be rejected.

Over objection, the trial court admitted as exhibits a number of colored photographs as slides which were displayed to the jury by projection upon a screen. These photographs were taken by one of the deputies, not a professional photographer; were developed by a professional photographer, and brought into court to show the scene of the crime immediately after the discovery of the body of the deceased Mrs. Van Arsdale, and the details of the autopsy. We find no prejudicial error here. The pictures of the autopsy were not necessary for a full understanding as to the cause of death; were gruesome, and in a measure, horrendous. The fact that the members of this panel of judges (all of whom were formerly trial judges), might not have permitted their introduction, does not make the admission an error which should be designated prejudicial.

A complete review of the medical findings was given orally and should have sufficed.

The autopsy report was admitted as an exhibit in the case. Such report bore a notation that the cause of the death of Margaret Van Arsdale was a severe beating. Of course, no one saw any of the acts which led to her death. This notation was mere opinion and should have been deleted from the coroner's report, which, under Section 313.10, Revised Code, is admissible as evidence as to the facts set out in his record. *Carson v. Metropolitan Life Ins. Co.*, 156 O. S. 104. However, this statement of opinion, notwithstanding its error in admission, cannot be considered prejudicial. In the course of the report, both written and from the oral testimony, there was given to the jury the details of broken bones, ruptured spleen, cut on chin, and torn and lacerated vaginal organs. No prejudicial errors could have resulted from the opinion statement in the autopsy report.

The appellant says the indictment being in the alternative is improper. He does not say he does not know the crime with which he is charged, or that he cannot determine the meaning of the indictment. He is charged with the death of Margaret Van Arsdale in committing a rape and attempting to commit a rape.

The statute defining murder in the first degree (Section 2901.01, Revised Code), uses the phrase "perpetrating or attempting to perpetrate rape." In the instant case, although great stress was laid upon the evidence of a vagina that was atrophied, and not capable of sexual relations, nevertheless, the statements of the appellant of repeated relations with the deceased Mrs. Van Arsdale made the alternative allegation necessary. The form of indictment as used meets the requirement set out in Section 2941.06, Revised Code, particularly in view of Sec-

tion 2941.08(I), Revised Code. See, also, Section 2941.29, Revised Code; and *Fry v. State of Ohio*, 43 O. App. 154. The indictment charges the offense of murder in the first degree and is not now subject to objection.

Considerable time was spent in oral argument over the alleged failure of the trial judge to properly define the included crime of manslaughter. The jury was told to examine the evidence with respect to first degree murder, and if they found any of the required claims not established beyond a reasonable doubt, then they should pass on to the included offense of second degree murder. If the jury were unable to agree that this included crime of second degree murder was not committed, then, and only then could they go further and consider another included offense, that of manslaughter. It is very apparent that the jury never considered any offense but first degree murder. They demonstrated by their verdict that no other crime was considered, and, hence, they never got to the point of inquiry as to manslaughter. Any alleged error in that charge could not be prejudicial.

We have examined the written instructions given to the jury, and we do not find them prejudicial to the rights of the appellant when examined as a complete charge.

The oral arguments of the prosecutor, and defense counsel, to the jury, are set out in full.

Complaint is made that the argument made by the prosecutor, and his assistant, was inflammatory and prejudicial. When viewed as a whole, we do not find it so in this case. While it is true that much of the argument was directed toward the feelings of the jury, and not a resume of the facts disclosed by the evidence, nevertheless, it did not transgress to such a point that we can find prejudicial error.

The use of certain physical items to demonstrate the contention of the prosecutor that the appellant did not testify truthfully about his relationship with the deceased, Mrs. Van Arsdale, was not prejudicial.

It is true that in the heat of trial, lawyers frequently forget, as was done here, that oral argument is not for the purpose of appealing to the feelings of the individual jurors, but, rather, such argument is to analyze the evidence and thereby point out to the jurors the truth of the position being advocated by the speaker. However, we find no error prejudicial to the rights of the appellant in the oral arguments to the jury.

In the oral argument presented in this appeal, counsel for appellant complained about the use of, and the manner of obtaining the confession of his client. No specific assignment of error raises this question, but we direct our attention to that complaint in the light of recent decisions of the United States Supreme Court.

The bill of exceptions states that in two or more instances, Woodards was apprised of his constitutional rights by an assistant prosecutor before questions were directed to him concerning his relations with Mrs. Van Arsdale. He had been questioned by a deputy sheriff previous to interrogation by the assistant prosecutor. This deputy also said that he told Woodards what his rights were but that, nevertheless, Woodards agreed to talk to him. There was no physical abuse or mistreatment of Woodards, but, on the contrary, his counsel said they treated him so nice that he was lulled into a sense of friendship, and by that means, Woodards divulged his conduct on the night of the crime.

Carnley v. Cochran, 369 U. S. 506, is no authority for a failure to obtain counsel for one who, knowing of his

rights, does not request counsel prior to making a confession of his criminal acts. Here we must say the record shows a waiver of counsel knowingly made.

Objection was made to the introduction into evidence of a statement which a deputy sheriff overheard Woodards make to his wife when she visited him in the jail. This objection was based upon the holding in the case of *Massiah v. United States*, 377 U. S. 201. There is no analogy in the facts.

In the instant case, Woodards knew of the presence of the deputy sheriff; the statement was made to his wife in answer to a question propounded by her; and the statement was voluntarily made. Further, it must be pointed out that the statement was hardly more than an admission that some act was done by him which, seemingly, he could not control. The statement was cumulative to a full and frank confession made earlier before indictment, and while the officers were investigating the case. The rule of the *Massiah* case, *supra*, does not apply.

Objection was made to the introduction of a statement given by Woodards to a deputy sheriff, on the ground that it was not lawfully obtained. The objection was not on the basis that the conversation regarding the conduct of Woodards at the Van Arsdale home was not voluntary, but that he was not then accorded his full constitutional rights. This objection is not supported by the cited case of *Jackson v. Denno*, 378 U. S. 368, 12 L. Ed. 2d 908. In that case, the confession was claimed to be involuntary; and the state of New York, where that accused person was tried, did not properly determine the issue of voluntary self-incrimination. That is not the situation herein. We must point out that no written confession was introduced in evidence in the instant case; Woodards and his doctor testified and told a generally similar story, except

as to the voluntariness of the relations between the accused and Mrs. Van Arsdale.

The rule laid down in various cases in the Federal courts, and reaffirmed in *Jackson v. Denno,* 12 L. Ed. 2d, p. 908 at 915, which rule is "* * * that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, * * * and even though there is ample evidence aside from the confession to support the conviction * * *." This rule was not violated in the case before us.

Another case cited by counsel for Woodards as authority for the claim (made in oral argument), that his constitutional rights had been violated, is *Gideon v. Wainwright,* 372 U. S. 335. In that case, Gideon was denied counsel. In the instant case, Woodards had very able counsel who skillfully used all lawful means to assist their client. Woodards' rights, under the rule announced in *Gideon v. Wainwright,* were not violated.

Our matter here is distinguishable, also, from the case of *Escobedo v. Illinois,* 12 L. Ed. 2d 977, decided June 22, 1964. In that case, incriminating statements were made by the accused in the presence of police officers who were investigating the crime. These statements were made before indictment. Up to that point, the facts of the instant case correspond, but the great difference is that in the case of *Escobedo v. Illinois, supra,* the accused was not informed of his right to remain silent, and his request for counsel, prior to making any statement, was denied. This is not our case, and there is no violation of due process based on that judicial pronouncement.

We have examined all claims of error and find none prejudicial to the rights of the appellent. The judgment must be affirmed.

Judgment affirmed.

JUDGMENT OF THE SUPREME COURT OF THE STATE OF OHIO, MARCH 30, 1966.

This cause, here on appeal from the Court of Appeals for Lorain County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this court proceeding as required by law to fix a date for carrying said sentence into execution, it is ordered by the Court that said sentence be carried into execution by the Warden of the Ohio Penitentiary, or in his absence by the Deputy Warden, on the 29th day of April, A. D. 1966, in accordance with the statutes in such case made and provided. It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Warden of the Ohio Penitentiary and the Warden make due return thereof to the Clerk of the Court of Common Pleas of Lorain County; and it appearing that there were reasonable grounds for this appeal; it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lorain County for entry.

APPENDIX B.

STATUTES AND RULE.

Ohio Revised Code.

§ 2321.03 *Exception not necessary.*

An exception is not necessary, at any stage or step of the case or matter, to lay a foundation for review whenever a matter has been called to the attention of the court by objection, motion, or otherwise and the court has ruled thereon. Error can be predicated upon erroneous statements contained in the charge, not induced by the complaining party, without exception being taken to the charge.

§ 2505.21 *Hearing on appeal.*

Appeals taken on questions of law shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant before hearing. Errors not specifically pointed out in the record and separately argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or specified. Failure to file such briefs and assignments of error within the time prescribed by the court rules is cause for dismissal of such appeal. All errors assigned and briefed shall be passed upon [by] the court. In its decision the reviewing court shall specify such of the assigned errors as it finds are shown by the record and the reasons for its decision. In every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state the errors found in the record upon which the judgment of reversal is founded.

An appeal taken on questions of law and fact entitles the party to a hearing and determination of the facts de

novo which shall be upon the same or amended pleadings. The court shall review the final order, judgment or decree upon such part of the record made in the trial court as any party may present to the court and such additional evidence as upon application in the interest of justice the court may authorize to be taken, such evidence to be presented in the manner and form prescribed by the court.

§ 2901.01 *Murder in the first degree.*

No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another.

Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life.

Murder in the first degree is a capital crime under Sections 9 and 10 of Article 1, Ohio Constitution.

§ 2935.05 *Affidavit filed in case of arrest without warrant.*

When a person named in section 2935.03 of the Revised Code has arrested a person without a warrant, he shall, without unnecessary delay, take the person arrested before a court or magistrate having jurisdiction of the offense, and shall file or cause to be filed an affidavit describing the offense for which the person was arrested. Such affidavit shall be filed either with the court or magistrate, or with the prosecuting attorney or other attorney charged by law with prosecution of crimes before such court or magistrate and if filed with such attorney he shall

forthwith file with such court or magistrate a complaint, based on such affidavit.

§ 2935.07 *Person arrested without warrant shall be informed of cause of arrest.*

When an arrest is made without a warrant by an officer, he shall inform the person arrested of such officer's authority to make the arrest and the cause of the arrest.

When an arrest is made by a private person, he shall, before making the arrest, inform the person to be arrested of the intention to arrest him and the cause of the arrest.

When a person is engaged in the commission of a criminal offense, it is not necessary to inform him of the cause of his arrest.

§ 2935.14 *Rights of person arrested.*

If the person arrested is unable to offer sufficient bail or, if the offense charged be a felony, he shall, prior to being confined or removed from the county of arrest, as the case may be, be speedily permitted facilities to communicate with an attorney at law of his own choice, or to communicate with at least one relative or other person for the purpose of obtaining counsel (or in cases of misdemeanors or ordinance violation for the purpose of arranging bail). He shall not thereafter be confined or removed from the county or from the situs of initial detention until such attorney has had reasonable opportunity to confer with him privately, or other person to arrange bail, under such security measures as may be necessary under the circumstances.

Whoever, being a police officer in charge of a prisoner, or the custodian of any jail or place of confinement, violates this section shall be fined not less than one hundred nor

more than five hundred dollars or imprisoned not more than thirty days, or both.

Federal Rules of Criminal Procedure.

Rule 5 (a) *Appearance before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

APPENDIX C.

MISCELLANEOUS.

Excerpt From the Opinion of Judge Kaufman in United States v. Freeman, 357 F. 2d 606, 612-627 (2nd Cir. 1966).

* * * * *

THE ISSUE RAISED AT TRIAL.

We shall first dispose of the government's contention that the defense did not offer a proper objection to the Court's rulings on the test to be applied. We need not tarry long on this aspect of the case.

When questioning Dr. Denber, Freeman's counsel inquired if, under a "strict interpretation" of M'Naghten, Freeman would be considered criminally responsible. Before Dr. Denber could answer, the government objected on the ground that the question inadequately defined the standard the doctor was to apply in giving his response. Judge Tenney, without ruling directly on the government's objection, declared that "This Court is following the M'Naghten rule in this case." [12] Thus put on notice by the Court as to the governing standard, Freeman's counsel promptly agreed that he would not inquire of Dr. Denber whether Freeman was capable of conforming his actions to the law in terms of any definition of criminal responsibility other than that provided by M'Naghten.

The government urges that the foregoing colloquy was not sufficiently specific, and accordingly asks us not to consider whether Freeman's competency was determined by the appropriate standard. Cf. *United States v.*

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[12] At a later point, the trial judge referred to the test as M'Naghten plus "irresistible impulse" but ultimately returned to just M'Naghten when counsel informed him there was no "irresistible impulse" question in the case.

Indiviglio, 352 F. 2d 276 (2d Cir. 1965). It argues that Freeman's counsel never objected to the court's decision to employ the M'Naghten Rules and, in addition, failed to offer alternative tests of criminal responsibility for the court's consideration. This failure, the government asserts, prevented Judge Tenney from passing meaningfully on the adequacy of M'Naghten with the result that we are deprived of the insight which prior judicial consideration could have provided.

We are persuaded that the colloquy with counsel referred to above sufficiently enlightened the court as to the point being raised. Fed. R. Crim. P. 51; see also *Jackson v. United States*, 250 F. 2d 897 (5th Cir. 1958). The exchange between Judge Tenney and Freeman's counsel indicates quite clearly that the Judge understood counsel's desire to elicit evidence which would have been relevant if the Judge determined to employ tests of criminal responsibility broader and more liberal than M'Naghten. We think it equally clear, moreover, that counsel reasonably interpreted the Judge's statement that M'Naghten was the rule in this Circuit as a direction from the Bench to restrict questions addressed to the expert witnesses solely to psychiatric information which would be admissible under the "right-wrong" test. Even if counsel had made elaborate offers of proof of Freeman's incompetency under the alternative tests, it is probable that Judge Tenney would have adhered to his decision in view of the long-standing use of M'Naghten in the District Courts.[13] Since it is apparent that both Court and counsel were fully cognizant of the issues being raised—and since any further showing would have been an exercise in futility—

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[13] Even after Freeman's counsel mentioned the *Durham* test, see *infra*, Judge Tenney indicated that he would adhere to M'Naghten.

it is entirely proper that we consider the governing principles on appeal.

I.

It need scarcely be observed that the sufficiency of the M'Naghten Rules as a test of criminal responsibility would not be an open question to us if the Supreme Court had definitely spoken on the issue. Bound by Supreme Court precedent, we would of course be compelled to follow any decision of that body which adopted M'Naghten as the exclusive criterion in federal prosecutions, regardless of our dissatisfaction with such a test. As a distinguished attorney and former Secretary of State has recently and perceptively observed in another context, federal judges are hardly empowered to satisfy a mere "desire for change in the law in accordance with the decider's own conception of right. [They] may conscientiously be seeking to administer justice, but it is personal justice—the justice of Louis IX or Harun al-Rashid, not that described on the lintel of the Supreme Court Building, 'Equal Justice Under Law.' "[14]

Despite the government's arguments to the contrary, however, we do not believe that the Supreme Court has placed its stamp of approval on M'Naghten, and we find the cases cited for this proposition to be readily and clearly distinguishable. Thus, *United States v. Davis* (I), 160 U. S. 469 (1895), and *United States v. Davis* (II), 165 U. S. 373 (1897), do not represent a square holding as to the sufficiency of M'Naghten. The former was concerned with the issue of burden of proof—rather than the applicable standard—while the latter primarily involved a claim that the trial court's charge was so narrow as not

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[14] Acheson, Morning and Noon, 69 (1965).

even to give the defendant the full benefit of M'Naghten. Neither case, in short, raised the question whether M'Naghten should be replaced or supplemented by alternative tests.[15]

Subsequent cases are equally barren of direct challenges to M'Naghten. *Hotema v. United States*, 186 U. S. 413 (1902), merely held a jury charge sufficiently broad to embrace the particular defense there asserted. *Matheson v. United States*, 227 U. S. 540 (1913), in which the charge strikingly foreshadowed the much later-developed *Durham* rule, turned on the fact that the instructions actually given were essentially those requested by the defendant. The remaining decisions cited by the government, finally, concern not a test to be applied in federal prosecutions, but rather the constitutional propriety under the Fourteenth Amendment's "due process" clause of state adoptions of M'Naghten or variations of M'Naghten. In *Leland v. Oregon*, 343 U. S. 790, 800 (1952), for example, Mr. Justice Clark wrote: "The science of psychiatry has made tremendous strides since that test was laid down in M'Naghten's case, but the progress of science has not reached a point where its learning would *compel us to require the states to eliminate the right and wrong test from their criminal law.*" (Emphasis supplied.) Our duty to supervise the administration of criminal justice in the courts of this Circuit can hardly be subject to the same

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[15] The first Mr. Justice Harlan focused the question presented in *Davis I* as follows: "Upon whom must rest the burden of proving that the accused, whose life it is sought to take under the forms of law, belongs to a class capable of committing a crime." 160 U. S. at 489.

While dicta are present in *Davis II* indicating approval of the trial judge's charge which was derived from M'Naghten, the record in that case leads us to believe that language is not sufficiently decisive to establish a rule of competency for the federal courts.

restrictions as our power to impose constitutional requirements upon unwilling state tribunals.

Our conclusion that the Supreme Court has not definitively spoken on the issue is in accord with that of a substantial number of the Courts of Appeals which have considered the question. Although the Court of Appeals for the Ninth Circuit found that only the Supreme Court or Congress[16] could modify M'Naghten, *Sauer v. United States,* 241 F. 2d 640 (9th Cir.), *cert. denied,* 354 U. S. 940 (1957), the District of Columbia, Third and Tenth Circuits adopted a contrary position. After an exhaustive analysis of the decisions in this area, Chief Judge Biggs, who has for many years advocated change and has authored exceptionally scholarly works on the subject, including his trailblazing dissent in *United States ex rel. Smith v. Baldi,* 192 F. 2d 540 (3rd Cir., 1951), concluded that the Third Circuit need not feel "constrained to adhere to and uphold the M'Naghten Rules." *United States v. Currens,* 290 F. 2d 751, 771 (1961). And Chief Judge Murrah, who has been an appellate judge for over a quarter of a century and has been in the forefront of judicial and administrative reforms, speaking for the Tenth Circuit, observed that since criminal responsibility was a rule of decision of the federal courts based upon common law concepts, it was always appropriate to "re-examine and re-appraise" it. *Wion v. United States,* 325 F. 2d 420, 425 (1963), *cert. denied,* 377 U. S. 946 (1964).[17] It also seems significant that in the face of a proliferation of cases in the area of criminal responsibility, the Supreme Court has consistently

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[16] M'Naghten is strictly a judge-made rule. Its use in the federal system does not stem from any Act of Congress.

[17] See also, Mueller, "M'Naghten Remains Irreplaceable: Recent Events in the Law of Incapacity," 50 Georgetown L. Jour. 105, 108 (1961): The courts of the United States "have inherent judicial power to rule on the law of insanity."

refrained from granting certiorari to consider this issue, despite inconsistent results among state courts and federal circuits.[18] At least one writer has suggested that the Supreme Court's inaction in this area is not mere coincidence, but is motivated by a desire to encourage the Circuits to discuss and develop alternative tests before making a definitive ruling.[19]

After considerable reflection on the issues presented, we therefore conclude that we cannot escape our duty to consider whether the M'Naghten Rules or the M'Naghten Rules augmented by the "irresistible impulse" test should continue to remain the test of criminal responsibility in this federal jurisdiction.

II.

We are here seeking a proper test of criminal responsibility. That we are not instead deciding the initial question —whether lack of such responsibility, however defined, should be a defense in criminal prosecutions—itself seems significant and worthy of at least some brief comment.

The criminal law, it has been said, is an expression of the moral sense of the community. The fact that the law has, for centuries, regarded certain wrong-doers as improper subjects for punishment is a testament to the extent to which that moral sense has developed. Thus, society has recognized over the years that none of the three asserted

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[18] Among the most prominent cases are: *United States v. Cain*, 298 F. 2d 934 (7th Cir.), *cert. denied*, 370 U. S. 902 (1962); *Sauer v. United States*, 241 F. 2d 640 (9th Cir.), *cert. denied*, 354 U. S. 940 (1957); *Wion v. United States*, 325 F. 2d 420 (10th Cir.), *cert. denied*, 377 U. S. 946 (1964); *Carter v. United States*, 325 F. 2d 697 (5th Cir.), *cert. denied*, 377 U. S. 946 (1964); *Dusky v. United States*, 295 F. 2d 743 (8th Cir.), *cert. denied*, 368 U. S. 998 (1962).

[19] Moore, Jr., "M'Naghten Is Dead—Or Is It?," 3 Houston L. Rev. 58, 60 (1965).

purposes of the criminal law—rehabilitation, deterrence and retribution—is satisfied when the truly irresponsible, those who lack substantial capacity to control their actions, are punished.[20]

What rehabilitative function is served when one who is mentally incompetent and found guilty is ordered to serve a sentence in prison? Is not any curative or restorative function better achieved in such a case in an institution designed and equipped to treat just such individuals? And how is deterrence achieved by punishing the incompetent? Those who are substantially unable to restrain their conduct are, by definition, undeterrable and their "punishment" is no example for others; those who are unaware of or do not appreciate the nature and quality of their actions can hardly be expected rationally to weigh the consequences of their conduct. Finally, what segment of society can feel its desire for retribution satisfied when it wreaks vengeance upon the incompetent? Although an understandable emotion, a need for retribution can never be permitted in a civilized society to degenerate into a sadistic form of revenge.[21]

A recognition that traditional notions of crime and punishment were inapplicable to the truly "irresponsible" hence came early to Anglo-American criminal law. We turn now to a consideration of those early stirrings.

III.

M'Naghten and its antecedents can, in many respects, be seen as examples of the law's conscientious efforts to

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[20] See Moberly, Responsibility, 1-24 (1956).

[21] See Wechsler and Michael, "A Rationale of the Law of Homicide," 37 Col. L. Rev. 701, 752-761 (1937).

"Revenge," in the words of Francis Bacon, "is a kind of wild justice which the more man's nature runs to, the more ought law to weed it out."

place in a separate category, people who cannot be justly held "responsible" for their acts. As far back as 1582, William Lambard of Lincoln's Inn set forth what can be viewed as the forerunner of the M'Naghten test as we know it: "If a man or a natural fool, or a lunatic in the time of his lunacy, or a child who apparently has no knowledge of good or evil do kill a man, this is no felonious act * * * for they cannot be said to have any understanding will." [22] By 1724, the language had shifted from "good or evil" to the more familiar emphasis on the word "know." Thus, in *Rex v. Arnold,* 16 How. St. Tr. 695, 764, the "Wild Beast" test was enunciated. It provided for exculpation if the defendant "doth not *know* what he is doing, no more than * * * a wild beast." [23] (Emphasis added.)

By modern scientific standards the language of these early tests is primitive. In the 18th Century, psychiatry had hardly become a profession, let alone a science. Thus, these tests and their progeny were evolved at a time when psychiatry was literally in the Dark Ages.[24]

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[22] As quoted in Moore, *op. cit. supra,* note 19 at 62.

[23] It is highly significant that Dr. Carson's conception of the M'Naghten rule harked back to the right-wrong formulation's ancient forerunner, the "Wild Beast" test. Testifying for the government, Dr. Carson described his view of the high degree of emotional and cognitive impairment required for M'Naghten to become applicable: "My personal concept of somebody of that degree of mental illness would be that he would not be able to participate in this particular type of common relationship, that he would, for example, not be able to care for himself adequately, perhaps need some type of constant personal supervision and somebody to clothe him, feed him. He might be agitated to a high degree that he would be *a very wild, incoherent* type of person." (Emphasis added.)

[24] For example, in this pre-M'Naghten period, belief in the concept of witchcraft was widespread and, unfortunately, became entangled in the attempt to set forth rules of criminal responsibility. Indeed, witches and wizards could never be exculpated on the ground of criminal incompetency because, by

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In the pre-M'Naghten period, the concepts of phrenology and monomania were being developed and had significant influence on the right and wrong test. Phrenologists believed that the human brain was divided into thirty-five separate areas, each with its own peculiar mental function. The sixth area, for example, was designated "destructiveness." It was located, we are told, above the ear because this was the widest part of the skull of carnivorous animals.[25] Monomania, on the other hand, was a state of mind in which one insane idea predominated while the rest of the thinking processes remained normal.[26]

Of course, both phrenology and monomania are rejected today as meaningless medical concepts since the human personality is viewed as a fully integrated system. But, by an accident of history, the rule of M'Naghten's case froze these concepts into the common law just at a time when they were becoming obsolete. A discussion of M'Naghten's case will demonstrate how this came about. Daniel M'Naghten suffered from what now would be described as delusions of persecution.[27] Apparently, he con-

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definition, they could distinguish between right and wrong. After all, these individuals who believed they possessed supernatural powers chose voluntarily to follow a course which was the very embodiment of evil. If it taxes credulity to acknowledge that "intelligent" people believed in witches and wizards, we merely need observe that no less an eminent legal scholar than Blackstone insisted that such creatures existed. Biggs, The Guilty Mind, 61 (1955).

[25] *Id.* at 93.

[26] Guttmacher and Weihofen, Psychiatry and the Law, 418 (1952).

[27] *Id.* at 403. That Guttmacher and Weihofen are correct in their diagnosis of M'Naghten's illness is borne out by the following excerpt from one of M'Naghten's statements: "The tories in my native city have compelled me to do this. They follow and persecute me wherever I go, and have entirely destroyed my

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sidered his major persecutor to be Robert Peel, then Prime Minister of England, for M'Naghten came to London with the intention of assassinating the chief of the Queen's government. His plan would have succeeded but for the fact that Peel chose to ride in Queen Victoria's carriage because of her absence from the city, while Drummond, his secretary, rode in the vehicle which normally would have been occupied by Peel. M'Naghten, believing that the Prime Minister was riding in his own carriage, shot and killed Drummond in error.[28]

After a lengthy trial in 1843, M'Naghten was found "not guilty by reason of insanity." M'Naghten's exculpation from criminal responsibility was most significant for several reasons. His defense counsel had relied in part upon Dr. Isaac Ray's historic work, *Medical Jurisprudence of Insanity,* which had been published in 1838. This book, which was used and referred to extensively at the trial, contained many enlightened views on the subject of criminal responsibility in general and on the weaknesses of the right and wrong test in particular. Thus, for example, the jury was told that the human mind is not compartmentalized and that a defect in one aspect of the personality could spill over and affect other areas. As Chief Judge Biggs tells us in his Isaac Ray lectures compiled in *The Guilty Mind,* the court was so impressed with this and

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peace of mind * * * I cannot sleep at night in consequence of the course they pursue towards me. * * * They have accused me of crimes of which I am not guilty, they do everything in their power to harass and persecute me; in fact they wish to murder me." Ellison and Haas, "A Recent Judicial Interpretation of the M'Naghten Rule," 4 Brit. Jour. of Delinquency 129 (1953), as quoted in Roche, "Criminality and Mental Illness—Two Faces on the Same Coin," 22 Univ. of Chi. L. Rev. 320, 324 (1955).

[28] Glueck, Mental Disorder and the Criminal Law, 162-63 (1925). See also Biggs, *op. cit. supra,* note 24 at 95-97.

other medical evidence of M'Naghten's incompetency that Lord Chief Justice Tindal practically directed a verdict for the accused.[29]

For these reasons, M'Naghten's case could have been the turning point for a new approach to more modern methods of determining criminal responsibility. But the Queen's ire was raised by the acquittal and she was prompted to intervene. Mid-19th Century England was in a state of social upheaval and there had been three attempts on the life of the Queen and one on the Prince Consort. Indeed, Queen Victoria was so concerned about McNaghten's acquittal that she summoned the House of Lords to "take the opinion of the Judges on the law governing such cases." Consequently, the fifteen judges of the common law courts were called in a somewhat extraordinary session under a not too subtle atmosphere of pressure[30] to answer five prolix and obtuse questions on the status of criminal responsibility in England. Significantly, it was Lord Chief Justice Tindal who responded for fourteen of the fifteen judges, and thus articulated what has come to be known as the M'Naghten Rules of M'Naghten test. Rather than relying on Dr. Ray's monumental work which had apparently impressed him at M'Naghten's trial, Tindal,

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[29] Biggs, *op. cit. supra,* note 24 at 102.

[30] A good example of the establishment's reaction to M'Naghten's acquittal is the address of the Lord Chancellor to the House of Lords: "A gentleman in the prime of life, of a most amiable character, incapable of giving offence or of injuring any individual, was murdered in the streets of this metropolis in open day. The assassin was secure; he was committed for trial; that trial has taken place, and he has escaped with impunity. Your Lordships will not be surprised that these circumstances have created a deep feeling in the public mind, and that many persons should, upon the first impression, be disposed to think that there is some great defect in the laws of the country with reference to this subject which calls for a revision of those laws in order that a repetition of such outrage may be prevented." As quoted in Glueck, *op. cit. supra,* note 28 at 164.

with the Queen's breath upon him, reaffirmed the old restricted right-wrong test despite its 16th Century roots and the fact that it, in effect, echoed such uninformed concepts as phrenology and monomania. In this manner, Dr. Ray's insights were to be lost to the common law for over one hundred years except in the small state of New Hampshire.[31]

The foregoing necessarily abbreviated historical account makes manifest some of the critical infirmities of the M'Naghten test, not the least of which are the manner in which it was formulated and the charged atmosphere in which it was spawned. Even contemporaries questioned the validity of a rule that was not the product of the case-by-case method traditional with common law judges. Thus, Mr. Justice Maule, the fifteenth member of the panel summoned by the House of Lords, concurred in the use of the right-wrong test but expressed deep reservations about answering questions put to the judges abstractly without the benefit of a concrete case and argument.[32] Sir James Stephen, the noted historian, was another who found fault with the system which produced M'Naghten. He observed that "every judgment delivered since the year 1843 has been founded upon an authority which deserves to be described as in many ways doubtful." [33] Dr. Henry Maudsley, Isaac Ray's English contemporary, remarked

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[31] Because of the influence of Dr. Ray, New Hampshire adopted a test which was a precursor of the modern *Durham* rule. See *State v. Pike*, 49 N. H. 399 (1870). See also, Reid, "Understanding the New Hampshire Doctrine of Criminal Insanity," 69 Yale L. Jour. 366 (1960); and Reid, "The Companion of the New Hampshire Doctrine of Criminal Insanity," 15 Vanderbilt L. Rev. 721 (1962).

[32] See generally 67 Hansard's Parliamentary Debates (3d Series) 714-774.

[33] II Stephen, History of the Criminal Law of England 153 (1883).

not long after the M'Naghten Rules were enunciated, that the judges were adhering to "an absurd dictum which has long been discredited by medical science." [34]

But the principal objection to M'Naghten is not that it was arrived at by this extraordinary process. Rather, the rule is faulted because it has several serious deficiencies which stem in the main from its narrow scope. Because M'Naghten focuses only on the cognitive aspect of the personality, i.e., the ability to know right from wrong, we are told by eminent medical scholars that it does not permit the jury to identify those who can distinguish between good and evil but who cannot control their behavior. The result is that instead of being treated at appropriate mental institutions[35] for a sufficiently long period to bring about a cure or sufficient improvement so that the accused may return with relative safety to himself and the community, he is ordinarily sentenced to a prison term as if criminally responsible and then released as a potential recidivist with society at his mercy. To the extent that these individuals continue to be released from prison because of the narrow scope of M'Naghten, that test poses a serious danger to society's welfare.[36]

Similarly, M'Naghten's single track emphasis on the cognitive aspect of the personality recognizes no degrees

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[34] As quoted in Guttmacher, "The Psychiatrist as an Expert Witness," 22 U. of Chi. L. Rev. 325 (1955).

[35] We recognize our inability to determine at this point whether society possesses sufficient hospital facilities and doctors to deal with criminals who are found to be incompetent. But our function as judges requires us to interpret the law in the best interest of society as a whole. We therefore suggest that if there are inadequate facilities and personnel in this area, Congress, the state legislatures and federal and state executive departments should promptly consider bridging the gap.

[36] Biggs, *op. cit. supra*, note 24 at 145. See also Note, "Legislative Changes in New York Criminal Insanity Statutes," 40 St. John's L. Rev. 76 (1965).

of incapacity. Either the defendant knows right from wrong or he does not and that is the only choice the jury is given. But such a test is grossly unrealistic; our mental institutions, as any qualified psychiatrist will attest, are filled with people who to some extent can differentiate between right and wrong, but lack the capacity to control their acts to a substantial degree. As the commentary to the American Law Institute's Model Penal Code observes, "The law must recognize that when there is no black and white it must content itself with different shades of gray." [37]

A further fatal defect of the M'Naghten Rule stems from the unrealistically tight shackles which they place upon expert psychiatric testimony. When the law limits a testifying psychiatrist to stating his opinion whether the accused is capable of knowing right from wrong, the expert is thereby compelled to test guilt or innocence by a concept which bears little relationship to reality. He is required thus to consider one aspect of the mind as a "logic-tight compartment in which the delusion holds sway leaving the balance of the mind intact. * * *" [38]

Prominent psychiatrists have expressed their frustration when confronted with such requirements. Echoing such complaints, Edward de Grazia has asked, "How [does one] translate 'psychosis' or 'psychopathy' or 'dementia praecox' or even 'sociopathy' or 'mental disorder' or 'neurotic character disorder' or 'mental illness' into a

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[37] American Law Institute, Model Penal Code (Tentative Drafts, Nos. 1, 2, 3 and 4) 158 (1956). See also, Gaylin, "Psychiatry and the Law: Partners in Crime," Columbia University Forum 23 (1965).

M'Naghten's insistence on absolutes also was recently criticized by Truman Capote in his book, In Cold Blood, as "a formula quite color-blind to any gradations between black and white * * *" p. 294.

[38] Glueck, *op. cit. supra,* note 28 at 169-170.

psychiatric judgment of whether the accused knew 'right' from 'wrong.'" [39] In stronger and more vivid terms, Dr. Lawrence Kolb, Director of the New York Psychiatric Institute, Professor and Chairman of the Department of Psychiatry at Columbia University and Director of the Psychiatric Service at Presbyterian Hospital, expressed a similar viewpoint when he declared that "answers supplied by a psychiatrist in regard to questions of rightness or wrongness of an act or 'knowing' its nature constitute a professional perjury." [40]

Psychiatrists are not alone in their recognition of the unreality of M'Naghten. As long ago as 1930, Mr. Justice Cardozo observed that "everyone contends that the present definition of insanity has little relation to the truths of mental life." [41] And Mr. Justice Frankfurter, as a witness before the Royal Commission on Capital Punishment, declared with his usual fervor: "I do not see why the rules of law should be arrested at the state of psychological knowledge of the time when they were formulated. * * * I think the M'Naghten Rules are in large measure shams. That is a very strong word, but I think the M'Naghten Rules are very difficult for conscientious people and not difficult enough for people who say, 'We'll just juggle them.'" [42]

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[39] de Grazia, "The Distinction of Being Mad," 22 U. of Chi. L. Rev. 339, 341 (1955). Mr. de Grazia is a member of the District of Columbia Bar.

[40] Remarks, Judicial Conference (2d Cir.), "Insanity as a Defense," 37 F. R. D. 365, 387 (1964).

[41] What Medicine Can Do For Law, 32 (1930).

[42] Report of the Royal Commission on Capital Punishment, 102 (1953). Indeed, the Royal Commission recommended abrogating M'Naghten and leaving the jury "to determine whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible." *Id.* at 116.

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The tremendous growth of psychiatric knowledge since the Victorian origins of M'Naghten and even the near-universal disdain in which it is held by present-day psychiatrists are not by themselves sufficient reasons for abandoning the test. At bottom, the determination whether a man is or is not held responsible for his conduct is not a medical but a legal, social or moral judgment. Ideally, psychiatrists—much like experts in other fields—should provide grist for the legal mill, should furnish the raw data upon which the legal judgment is based. It is the psychiatrist who informs as to the mental state of the accused—his characteristics, his potentialities, his capabilities. But once this information is disclosed, it is society as a whole, represented by judge or jury, which decides whether a man with the characteristics described should or should not be held accountable for his acts. In so deciding, it cannot be presumed that juries will check their common sense at the courtroom door. As Professor Wechsler has rightly commented, "It's not to be expected that juries will lightly accept the proposition that one who seemingly knew in a true sense did not know. One would expect jury skepticism and the system is the healthier for that jury skepticism." [43]

The true vice of M'Naghten is not, therefore, that psychiatrists will feel constricted in artificially structuring their testimony but rather that the ultimate deciders—the judge or the jury—will be deprived of information vital to their final judgment. For whatever the social climate

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Mr. Justice Douglas and Mr. Justice Brennan have also indicated dissatisfaction with M'Naghten. See Douglas, "The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists," 41 Iowa L. Rev. 485 (1956). Brennan, "Psychiatry Must Join in Defending Mentally Ill Criminals," 49 A. B. A. J. 239 (1960).

[43] Remarks, *op. cit. supra,* note 40 at 385.

of Victorian England, today's complex and sophisticated society will not be satisfied with simplistic decisions, based solely upon a man's ability to "know" right from wrong. It is in this respect that the vast strides made in public awareness and acceptance of psychiatry and psychiatric methods may even be more significant than the scientific developments which gave rise to them. Few areas of modern American culture—from the personnel offices of our giant corporations to the pages of our mass-circulation magazines—have been untouched by the psychiatric revolution. In this setting, a test which depends vitally on notions already discredited when M'Naghten was adopted can no longer be blandly accepted as representing the "moral sense of the community." To continue to apply such medically discarded concepts would be to follow a negative approach which is the result of a hold-over of long outmoded attitudes rather than a policy decision grounded in reason or science.

IV.

Efforts to supplement or replace the M'Naghten Rules with a more meaningful and workable test have persisted for generations, with varying degrees of success. Perhaps the first to receive judicial approval, however, was more an added fillip to M'Naghten than a true substitute: the doctrine which permits acquittal on grounds of lack of responsibility when a defendant is found to have been driven by an "irresistible impulse" to commit his offense.[44] In one form or another, the "irresistible impulse" test has become encrusted on the law of several jurisdictions, in-

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[44] See discussion in "Murder Without Apparent Motive: A Study in Personality Disorganization," by Satten, J., Menninger, K., Rosen, I., and Mayman, M., in 117 Am. Jour. Psych., 48-53 (1960).

cluding the District Courts of this Circuit, and is now a familiar part of the vocabulary of millions since it was successfully invoked by the defendant of Robert Travers' celebrated novel and motion picture, "Anatomy of a Murder."

As it has commonly been employed, however, we find the "irresistible impulse" test to be inherently inadequate and unsatisfactory. Psychiatrists have long questioned whether "irresistible impulses" actually exist; the more basic legal objection to the term "irresistible impulse" is that it is too narrow and carries the misleading implication that a crime impulsively committed must have been perpetrated in a sudden and explosive fit. Thus, the "irresistible impulse" test is unduly restrictive because it excludes the far more numerous instances of crimes committed after excessive brooding and melancholy by one who is unable to resist sustained psychic compulsion or to make any real attempt to control his conduct.[45] In seeking one isolated and indefinite cause for every act, moreover, the test is unhappily evocative of the notions which underlay M'Naghten—unfortunate assumptions that the problem can be viewed in black and white absolutes and in crystal-clear causative terms.

In so many instances the criminal act may be the reverse of impulsive; it may be coolly and carefully prepared yet nevertheless the result of a diseased mind.[46] The "irresistible impulse" test is therefore little more than a gloss on M'Naghten, rather than a fundamentally new approach to the problem of criminal responsibility. It is, as one pro-

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[45] Wechsler, "The Criteria of Criminal Responsibility," 22 U. of Chi. L. Rev. 367, 393 (1955).

[46] See Report, Royal Commission on Capital Punishment, *op. cit. supra*, note 42 at 110.

fessor explained, "a relatively unobnoxious attempt to improve upon M'Naghten." [47]

With the exception of New Hampshire, American courts waited until 1954 and Judge Bazelon's opinion for the District of Columbia Circuit in *Durham v. United States*,[48] for legal recognition that disease or defect of the mind may impair the whole mind and not a subdivided portion of it. The *Durham* court swept away the intellectual debris of a century and articulated a test which was as simple in its formulation as its sources were complex. A defendant is not criminally responsible, wrote Judge Bazelon, "if his unlawful act was the product of mental disease or mental defect." [49]

The advantages of *Durham* were apparent and its arrival was widely hailed. The new test entirely eliminated the "right-wrong" dichotomy, and hence interred the overriding emphasis on the cognitive element of the personality which had for so long plagued M'Naghten. The fetters upon expert testimony were removed and psychiatrists were permitted and indeed encouraged to provide all relevant medical information for the common sense application of judge or jury.

Finally, *Durham* ended to a large degree the "professional perjury" decried by psychiatrists—the "juggling" of legal standards made inevitable by M'Naghten and rightly deplored by Justice Frankfurter. Too often, the unrealistic dogma of M'Naghten had compelled expert witnesses to "stretch" its requirements to "hard cases"; sympathetic to the plight of a defendant who was not, in fairness, responsible for his conduct, psychiatrists had found it necessary

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[47] Mueller, *op. cit. supra* note 17 at 107.

[48] 214 F. 2d 862 (1954).

[49] *Id.* at 874.

to testify that the accused did not know his act was "wrong" even when the defendant's words belied this conclusion. In its frank and express recognition that criminality resulting from mental disease or defect should not bring forth penal sanctions, *Durham* brought an end to this all-too-frequent practice of "winking" at legal requirements, a practice which had contributed little to the self-respect and integrity of either medicine or the law.

In the aftermath of *Durham*, however, many students of the law recognized that the new rule, despite its many advantages, also possessed serious deficiencies. It has been suggested, for example, that *Durham's* insistence that an offense be the "product" of a mental disease or defect raised near-impossible problems of causation,[50] closely resembling those encountered by the M'Naghten and irresistible impulse tests.

The most significant criticism of *Durham*, however, is that it fails to give the fact-finder any standard by which to measure the competency of the accused. As a result, psychiatrists when testifying that a defendant suffered from a "mental disease or defect" in effect usurped the jury's function. This problem was strikingly illustrated in 1957, when a staff conference at Washington's St. Elizabeth's Hospital reversed its previous determination and reclassified "psychopathic personality" as a "mental disease." Because this single hospital provides most of the psychiatric witnesses in the District of Columbia courts, juries were abruptly informed that certain defendants who had previously been considered responsible were now to be acquitted. *Blocker v. United States*, 288 F. 2d 853, 860 (D. C. Cir. 1961) (Burger, *J.* concurring). It seems clear

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[50] Weihofen, "The Flowering of New Hampshire," 22 U. of Chi. L. Rev. 356, 360 (1955).

that a test which permits all to stand or fall upon the labels or classifications employed by testifying psychiatrists hardly affords the court the opportunity to perform its function of rendering an independent legal and social judgment.[51]

V.

In 1953, a year before *Durham*, the American Law Institute commenced an exhaustive study of criminal conduct including the problem of criminal responsibility. In the ensuing months and years, under the scholarly direction of Professors Herbert Wechsler of Columbia University, its Chief Reporter, and Louis B. Schwartz of the University of Pennsylvania, Co-Reporter, the leading legal and medical minds of the country applied themselves to the task. Gradually and painstakingly a new definition of criminal responsibility began taking shape as Section 4.01 of the Model Penal Code was evolved. Before its penultimate articulation, drafts and redrafts of the section were submitted to and revised by an advisory committee comprised of distinguished judges, lawyers, psychiatrists, and penologists. After committee approval was obtained, successive drafts were debated and considered by the Council, and later by the full membership, of the Institute. Nine long years of research, exploration and consideration culmi-

[51] To correct many of the deficiencies of *Durham*, the Washington, D. C. Court of Appeals amplified its definition of mental disorder for the purpose of making "it very clear that neither the court nor the jury is bound by ad hoc definitions or conclusions as to what experts state is a disease or defect." To reinforce its decision, the Court redefined mental disease and defect to include "any abnormal condition of the mind which *substantially* affects mental or emotional processes and *substantially* impairs behavior controls." *McDonald v. United States*, 312 F. 2d 847, 851 (1962) (Emphasis added). It thus adopted a formulation which closely approximates the recommendation of the American Law Institute in its Model Penal Code. See *infra*.

nated in the definitive version of Section 4.01, which was finally adopted by the Institute in 1962.

Section 4.01 provides that "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." [52] For reasons which will be more fully set forth, we believe this test to be the soundest yet formulated and we accordingly adopt it as the standard of criminal responsibility in the Courts of this Circuit.

The gravamen of the objections to the M'Naghten Rules is that they are not in harmony with modern medical science which, as we have said, is opposed to any concept which divides the mind into separate compartments—the intellect, the emotions and the will. The Model Penal Code formulation views the mind as a unified entity and recognizes that mental disease or defect may impair its functioning in numerous ways. The rule, moreover, reflects awareness that from the perspective of psychiatry absolutes are ephemeral and gradations are inevitable. By employing the teling word "substantial" to modify "incapacity," the rule emphasizes that "any" incapacity is not sufficient to justify avoidance of criminal responsibility but that "total" incapacity is also unnecessary. The choice of the word "appreciate," rather than "know" in the first branch of the test also is significant; mere intellectual awareness that

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[52] American Law Institute, Model Penal Code (final draft) (1962).

We have adopted the word "wrongfulness" in Section 4.01 as the American Law Institute's suggested alternative to "criminality" because we wish to include the case where the perpetrator appreciates that his conduct is criminal, but, because of a delusion, believes it to be morally justified. See *People v. Schmidt*, 216 N. Y. 324 (1916) (Cardozo, J.).

conduct is wrongful, when divorced from appreciation or understanding of the moral or legal import of behavior, can have little significance.

While permitting the utilization of meaningful psychiatric testimony,[53] the American Law Institute formulation, we believe, is free of many of the defects which accompanied *Durham*. Although it eschews rigid classification, the Section is couched in sufficiently precise terms to provide the jury with a workable standard when the judge charges in terms comprehensible to laymen.[54] Expert testimony, in short, will be admissible whenever relevant but always *as* expert testimony—and not as moral or legal pronouncement. Relieved of their burden of divining precise causal relationships, the judge or jury can concentrate

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[53] We note that while the Model Penal Code permits, and, indeed, encourages the production of full psychiatric data and information at trial, such testimony can have weight only if the underlying examination of the defendant was thorough. In most instances, one hour of psychiatric examination of the defendant in the House of Detention in preparation for trial is not an adequate substitute for a complete psychiatric and neurological work-up of the defendant in a hospital under the care and guidance of a staff of experts.

Moreover, as we have indicated, for many years psychiatrists have urged, almost with one voice, the replacement of the M'Naghten rule. Their persuasive advocacy of change is now meeting with gradual success, as modern psychiatric theories of normal and deviant personality development and functioning have gained increasing acceptance. It is desirable, therefore, that the altered standard for criminal responsibility which has been adopted today should not become the *causa sine qua non* of unseemly contests between psychiatric experts. We may anticipate a weakening of public confidence in the value of psychiatric concepts and a reaction against them if this should result.

[54] In framing charges, the following caveat is interesting: "I believe that mental disease is a complex and intricate matter and we cannot make it simple and understandable to everyone just by inventing simple words or phrases to describe it." 112 Cong. Rec. 2855 (1966) (Remarks of Senator Thomas J. Dodd).

upon the ultimate decisions which are properly theirs, fully informed as to the facts.

Under the American Law Institute formulation, an inquiry based on meaningful psychological concepts can be pursued.[55] The most modern psychiatric insights will be available, but, even more importantly, the legal focus will be sharper and clearer. The twin branches of the test, significantly phrased in the alternative, will remove from the pale of criminal sanctions precisely those who are in no meaningful sense responsible for their actions.

We do not delude ourselves in the belief that the American Law Institute test is perfect. Perfection is unattainable when we are dealing with a fluid and evolving science. Furthermore, we are aware that the Courts of Appeal for the District of Columbia, Third and Tenth Circuits have not adopted the American Law Institute test *haec verba*, but have employed their own language approaching the objectives of the Model Penal Code formulation.[56] As an illustration, in the scholarly opinion of Chief

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[55] The opportunity that psychiatrists will now have to present their findings and conclusions in their own scientific language should remove a barrier which made such experts reluctant to give testimony in cases turning on M'Naghten. We trust that they will also now make themselves available to be called on for testimony under the provisions of the Criminal Justice Act or where the court may desire the opinion of an independent expert.

[56] New York State, on July 1, 1965, rejected M'Naghten and adopted a test based largely upon the American Law Institute formulation. Section 1120 of the New York Penal Law provides:

> A person is not criminally responsible for conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to know or appreciate either:
>
> (a) The nature and consequence of such conduct; or
>
> (b) That such conduct was wrong.

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Judge Biggs in *United States v. Currens, supra,* the Third Circuit adopted the second branch of the Model Penal Code test—substantial capacity to conform one's conduct to the requirements of the law—but deleted the first, referring to "appreciation" of wrongfulness. While we can understand that Court's reluctance to stress the cognitive element of the personality in light of M'Naghten's emphasis on that aspect, we cannot accept its formulation; the gravamen of psychiatric objections to the M'Naghten Rules, as we have seen, was not that they looked to the cognitive feature of the personality, undeniably a significant aspect of the total man, but that they looked to this element *exclusively.* In *Wion v. United States, supra,* Chief Judge Murrah in his thoughtful opinion adopted Section 4.01, but added a proposed jury instruction re-

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In addition, Vermont has provided by statute that "The M'Naghten test of insantiy in criminal cases is hereby abolished." Vermont Stat. Anno. § 13: 4802. And in 1957, Vermont enacted as its rule for determining criminal responsibility, a formulation strikingly similar to Section 4.01 of the Model Penal Code:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks adequate capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Vermont Stat. Anno. § 13: 4801.

Connecticut, also, does not adhere to a strict M'Naghten formulation. Its test for criminal competency states:

> To be the subject of punishment, an individual must have mind and capacity, reason and understanding enough to enable him to judge of the nature, character and consequence of the act charged against him that the act is wrong and criminal, and that the commission of it will justly and properly expose him to penalty. *State v. Davies,* 146 Conn. 137, *cert. denied,* 360 U. S. 921 (1959).

It would be incongruous, indeed, if the federal courts which have traditionally concerned themselves with formulating guidelines for fairer trials were to remain frozen to the old M'Naghten Rules while the state courts in this Circuit pursued the more modern and enlightened course.

lating to the defendant's capability of "knowing" what he was doing; for reasons we need not labor, we prefer the Model Penal Code's use of "appreciate" rather than "know."

We believe, in sum, that the American Law Institute test—which makes no pretension at being the ultimate in faultless definition—is an infinite improvement over the M'Naghten Rules, even when, as had been the practice in the courts of this Circuit, those Rules are supplemented by the "irresistible impulse" doctrine. All legal definitions involve elements of abstraction and approximation which are difficult to apply in marginal cases.[57] The impossibility of guaranteeing that a new rule will always be infallible cannot justify continued adherence to an outmoded standard, sorely at variance with enlightened medical and legal scholarship. No one would suggest that a physician-expert called to state an opinion with respect to a litigant's orthopedic or neurological condition should be restricted in his reply to a single isolated cause to the exclusion of other relevant and important findings and conclusions—much less to concepts developed at the outset of Victoria's reign. In a criminal trial, when life and liberty hang in the balance, such arbitrary limitations on expert and jury are all the less defensible.

The genius of the common law has been its responsiveness to changing times, its ability to reflect developing moral and social values. Drawing upon the past, the law must serve—and traditionally has served—the needs of the present. In the past century, psychiatry has evolved from tentative, hesitant gropings in the dark of human ignorance to a recognized and important branch of modern

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[57] See Report, Royal Commission on Capital Punishment, *op. cit. supra* note 42 at 114.

medicine. The outrage of a frightened Queen has for too long caused us to forego the expert guidance that modern psychiatry is able to provide.

VI.

Since Freeman's responsibility was determined under the rigid standards of the M'Naghten Rules, we are compelled to reverse his conviction and remand the case for a new trial in which the criteria employed will be those provided by Section 4.01 of the Model Penal Code.

And lest our opinion be misunderstood or distorted, some additional discussion is in order. First, we wish to make it absolutely clear that mere recidivism or narcotics addiction will not of *themselves* justify acquittal under the American Law Institute standards which we adopt today. Indeed, the second clause of Section 4.01 explicitly states that "the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." We approve and adopt this important caveat.

There may be instances where recidivists will not be criminally responsible, but this will be for determination in each individual case depending upon other evidence of mental disease augmenting mere recidivism with the ultimate determination dependent upon the proper application of the standards we have adopted. But, we stress, repeated criminality cannot be the *sole* ground for a finding of mental disorder; a contrary holding would reduce to absurdity a test designed to encourage full analysis of all psychiatric data and would exculpate those who knowingly and deliberately seek a life of crime.

Nor may narcotics addiction without more be the sole evidence of abnormality under the American Law Institute test. We have observed that the defense of lack of

responsibility is essentially an acknowledgment on the part of society that because of mental disease or defect certain classes of wrongdoers are not properly the subjects of criminal punishment. In light of the severe penalties imposed by Congress for the possession and sale of narcotics, it would be unwise at this stage of medical knowledge, for a court to conclude that those addicted to narcotics should be, for that reason alone, immune from criminal sanctions.

Secondly, in order to avoid any misapprehension as to the thrust of our opinion some mention should be made of the treatment to be afforded individuals found to lack criminal responsibility under the test we adopt. There is no question but that the security of the community must be the paramount interest. Society withholds criminal sanctions in cases of incompetence out of a sense of compassion and understanding. It would be obviously intolerable if those suffering from a mental disease or defect of such a nature as to relieve them from criminal responsibility were to be set free to continue to pose a threat to life and property.

A verdict of "not guilty by reason of incompetency" has, in the past, been equivalent in the federal judicial system to a simple "not guilty" verdict because of the existing void in provisions for commitment and treatment. As a result of the comparatively recent adoption by various federal courts of more enlightened tests of responsibility, we trust that Congress will explore its power to authorize commitment of those acquitted on these grounds.[58] Such was the result of *Durham* in the District of Columbia; shortly after that decision, Congress provided for mandatory post-trial commitment in all cases in the District

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[58] But see, *Pollard v. United States*, 285 F. 2d 81 (6th Cir. 1960).

resulting in acquittals on grounds of lack of responsibility.[59] Pending Congressional action, however, we are confident that the several states will continue to step into the breach as they have in the past. Accordingly, we suggest that those adjudged criminally irresponsible promptly be turned over to state officials for commitment pursuant to state procedures.

Effective procedures for institutionalization and treatment of the criminally irresponsible are vital as an implementation to today's decision.[60] Throughout our opinion, we have not viewed the choice as one between imprisonment and immediate release. Rather, we believe the true choice to be between different forms of institutionalization—between the prison and the mental hospital. Un-

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[59] Krash, "The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia," 70 Yale L. Jour. 905, 940-948 (1960). D. C. Code Anno. § 24-301 (d).

[60] As Professor Wechsler observed, commitment after a verdict of "not guilty by reason of criminal incompetency" is not only desirable but necessary in the sound administration of justice: "* * * I also believe that it is part of any proper system that when a defendant in a criminal case asks for exemption from conviction and condemnation on the ground of irresponsibility, that it is appropriate that there should be as a requirement of law a civil commitment if that defense is sustained. And that, as a matter of fact, is now the law of New York as a result of a statute [N. Y. Code Crim. Proc. § 454] passed two or three years ago. Now, how long should the detention last? Well, it certainly ought to last long enough to allow a full diagnostic study and a determination as to whether it is safe to release the offender from his own point of view and from the point of view of others. The New York statute justified detention on grounds of public danger so long as that danger endures." Remarks, *op. cit. supra* note 39 at 398.

We believe that such institutionalization will deter "normal" defendants from choosing to defend on the ground of irresponsibility. The prospect of commitment to a mental institution for an indeterminate period is much less desirable than a fixed term in prison. See Fried, "Impromptu Remarks," 76 Harvard L. Rev. 1319 (1963). See also Report, Royal Commission on Capital Punishment, *op. cit. supra*, note 42 at 104-5.

derlying today's decision is our belief that treatment of the truly incompetent in mental institutions would better serve the interests of society as well as the defendant's.[61]

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[61] Indeed, the Judiciary Committee of the United States Senate has been concerned with M'Naghten, *Durham* and their progeny. Senator Thomas J. Dodd of Connecticut, a member of that Committee and Chairman of a sub-committee which made an exhaustive study of the operation of *Durham* as refined by *McDonald, supra,* revealed his perceptiveness in a statement on the subject of criminal responsibility. 112 Cong. Rec. 2853-2856 (1966). Senator Dodd recognizing that "the mental patient and his status under criminal law constitute a problem that has defied solution throughout history," nevertheless firmly rejected M'Naghten and cautioned against retreating to its precepts and adopting "less satisfactory procedures because of peripheral rather than substantial difficulties involved in maintaining [Durham]."

Speaking of the need for proper treatment of those found not guilty by reason of incompetency, Senator Dodd observed:

> I do not want the courts to revert to injustice because it is too difficult or too expensive or too inconvenient to make justice work * * * What I am saying is that we should be more concerned with determining whether or not an offender is mentally incompetent than with inventing techniques, definitions and procedural devices to keep insanity pleas to the minimum. * * *
>
> The thin line between criminal responsibility and irresponsibility because of mental disease is not always clearly visible. Thus, we are confronted with questions of policy regarding how we want to react to marginal cases. It seems that the general public and certain segments of the legal profession and law enforcement would like to treat them as criminals rather than as patients. And yet, if we send even marginal cases to the mental hospital and rehabilitate them so that they no longer break the law, we have scored a success. On the other hand, if we send such marginal cases to prison, they may come back to haunt society after their release, more mentally disturbed, more irresponsible, and more crime prone than ever before, because whatever the prison does to men it does not cure mental illness.
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> This is the type of reasoning which has led me to support in principle a rather general and inclusive rule of criminal responsibility instead of a narrow and restrictive one. * * * The important thing is to render the dangerous person harmless. And it is best to do this by correction rather than simply by incarceration. * * *

(Continued on following page)

The New York Times, March 22, 1965.

The Death Penalty Must Go.

The movement, running at full tide across the nation, to abolish capital punishment has received the influential and authoritative support of New York's Commission on Revision of the Penal Code. This bipartisan body, composed of legislators and lawyers, has been at work for four years rewriting and recodifying criminal law, the first complete modernization in nearly 85 years.

Unanimity on this controversial issue was not to be expected, nor was it achieved. But the vote was 8 to 4 for ending the death penalty. The majority report, drafted by Prof. Herbert Wechsler of Columbia, is convincing. It finds that making the state a hangman is "barbarism." It argues that existence of the death penalty has "a seriously baneful effect on the administration of justice," arousing mistaken sympathy for the defendant, even when guilty.

This is a factor that the president of the National District Attorneys Association, George M. Scott, evidently had in mind last week in urging the association to support abolition of the death penalty. He declared that "capital punishment cases make bad law." In many jurisdictions increasing difficulty has been found in getting juries to find defendants guilty because of the cruel finality of the death penalty.

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We must make sure that we do not attack the law when the deficiency, may be elsewhere, for example, in the release procedures from our institutions. * * * By definition, a mentally ill person must be committed to an institution for an indeterminate period of time. We owe the public the protection of keeping him there until cured. * * * I believe this procedure is by far sounder than the "ostrich approach" of sending mentally diseased men and women to prison, hoping that they will be miraculously cured and rehabilitated in a place we know to be traditionally incapable of producing such resurrections.

A major element in the Albany commission's indictment of capital punishment is the ever-present horror of erroneous conviction. With emphatic understatement the report says "such errors cannot be corrected after execution." It notes an inescapable fact that "some erroneous convictions are inevitable," and adds the demonstrated one that error sometimes cannot be established until time has passed.

The minority report offers no proof that the death penalty has special deterrent power against crime, but relies on an effort to alarm the public of dire consequences that might follow abolition. "There is more crime in the State of New York than anywhere else in the world," says the minority.

Yet, it should be observed that the very level of heinous crimes that the minority—and the public no less—deplores exists in a state that does have, and has long had, capital punishment. If capital punishment were, in proved fact, an effective deterrent, then New York surely would by now have a reduced amount of violent crime.

The national concern over capital punishment was dramatically demonstrated last Friday in Tennessee when, after a bill for abolition failed by a single vote in the Legislature, Governor Clement went to the state penitentiary's Death Row and commuted to life imprisonment the sentences of five convicts—three of whom were scheduled to die at dawn the next day.

New York has twenty-one men awaiting death in the electric chair. Maybe they are all guilty, and in their cases there would be no irreversible error. But who could be sure, ever? Their execution will bring no victim back to life. It will simply make the state take a score of lives in an act of retribution that unbearably troubles the public conscience. The Legislature should abolish the death sentence.

Portland Reporter, Portland, Oregon, August 11, 1962.

Secret Shame of Executions.

A grim black-bordered invitation to attend the execution by gas of Leeroy Sanford McGahuey at the Oregon state prison Aug. 20 was reproduced in the Friday editions of The Reporter.

If the execution occurs as scheduled a score or so of persons who have received similar invitations will gather on the walkway around the small lethal gas chamber at 15 minutes past midnight on that day and watch the state of Oregon, under the cloak of legal decree, snuff out a human life. Perhaps half will watch. The others will avert their gaze in sickened shame.

This is in marked contrast to the way executions occurred in Oregon—and elsewhere—two generations ago. A Reporter subscriber tells us of the last public hanging in Wasco county around the turn of the century.

In those days the execution occurred at the county seat where the man was convicted. Our informant recalls that it was an informal holiday in the little town of The Dalles. There was the accustomed preparation—building of the scaffold on the courthouse lawn. And finally the gathering of the crowd. Children and adults, none with a black-bordered invitation, watched as the condemned man, a convicted killer, fell through the trap. It was a grim but very public execution.

In those honest but misguided days the theory in law of capital punishment was that a public execution should be public—and would serve to deter others from a like path of crime.

Today, whether we like it or not, we see the state performing its law-imposed requirement of deliberate taking of a human life under a cloak of semi-secrecy within the prison walls and in such a way that only prison and state

officials and those few invited as witnesses see this atrocious official act.

And the state, by the very fact that it cloaks an execution with the privacy afforded by the grim prison walls, admits that it is publicly ashamed of what it must do under the banner of ultimate justice.

More honest it would be, and more reflective of true attitudes toward capital punishment, if the state conducted its executions, such as it may have, in utter privacy.

For taking human life is wrong. It is against religious and moral principle. It is destructive. And it does not prevent future crime.

It demeans those who, as agents of the state, must perform the deed to the same ethical level as the criminal and killer they are executing.

No wonder, then, that executions today are shrouded in semi-secrecy!

The fact that a potassium cyanide pill does the job instead of the grim noose of yesteryear is no alleviation.

The exercise by the state—or any constituted government—of capital punishment in any form is no preventive of future crime.

Based on experience of reporters who have viewed executions by hanging and by gas we know that most of those who witness that ghastly event at Salem Aug. 20 will be inwardly sickened.

For in this instance man is trying to play God. He is, through the instrument of the state, taking a human life deliberately and under the guise of man-made law.

Authorities have reported that states which have abolished capital punishment have lower murder rates than states which retain it.

Nine states—Alaska, Delaware, Hawaii, Maine, Michigan, Minnesota, North Dakota, Rhode Island and Wisconsin—have no capital punishment.

We would hope that Oregon soon would join these enlightened ranks.

St. Petersburg Times, St. Petersburg, Florida, February 22, 1959.

Capital Punishment Is Medieval.

Gov. LeRoy Collins has announced that he may ask the 1959 Legislature to abolish capital punishment in Florida.

Due to complex tax and budgetary problems, and the emotional confusion which is gripping legislators over school desegregation, the chances of this reform this year cannot be said to be favorable. Enough legislators are rednecked over Governor Collins' firmly moderate policy on desegregation that anything progressive he favors is apt to be buried out of sheer spite.

Nevertheless, we hope that the Governor does make his request so that the process of educating the public on the facts regarding capital punishment may begin.

PENOLOGY HAS THREE proper objectives:

Protection of society;

Reform of the criminal;

Deterrence to others.

Unfortunately, a fourth factor often is included—vengeance.

Vengeance, the blind instinct to hit back at one who has done injury, is a perfectly human reaction. Equally, however, it is totally barbaric and uncivilized. Retaliation, either on the part of the victim of a crime or society itself, is as much outside the moral code as the crime itself.

IN THE CASE OF murder, which is the usual crime punished by the death penalty, although Florida includes

rape—with the ultimate penalty virtually never assessed against a white person—let us consider the above objectives.

Society is protected against a murderer by life imprisonment which is actually for life—something the Legislature can control—quite as much as by execution.

Reform is a somewhat moot point, if the prisoner is actually in for life. Yet statistics prove that murderers are less apt to be "repeaters" when released on parole or at the expiration of term sentences than any other class of criminal.

In New Jersey, for instance, in the past 10 years 117 "lifers" have been paroled and not a single one committed another murder, and only 8½ per cent violated their paroles in any way.

THIS BRINGS UP the matter of deterrence. The most vigorous arguments advanced by those favoring capital punishment is that it deters crime—that potential murderers are worse scared of the death penalty than anything else.

The record absolutely refutes this argument. Six American states have had no death penalty for the past 30 years (Delaware abolished it last year). Studies at five-year intervals show the following:

The homicide rate per 100,000 population in the non-death penalty states has ranged from 4.2 to 2.1—not higher than 2.2 in the past 20 years. In the death penalty states the range has been from 5.5 to 10.5—averaging 6.3 since 1938.

The record in 40 foreign nations which have abolished the death penalty has been similar. It is unmistakably clear that if abolition of the death penalty actually does not reduce the homicide rate, at least it does not increase it.

THIS LEAVES VENGEANCE as the only excuse for the death penalty—sometimes defended on the "eye for an eye, tooth for a tooth" principle. Yet it is notable that even the leaders of modern Jewry repudiate this Old Testament concept. And certainly it has no place in the Christian ethic.

There is no need to stress such further points as the fact that there have been all too many occasions when the innocence of a person has been proven beyond question—after the execution.

It is enough—at least it should be enough—to say that a civilized people and a civilized state should not tolerate this medieval remnant of a social system not too far removed from barbarism.

Memphis Press-Scimitar, Memphis, Tennessee, October 28, 1958.

Serious Thought on Death Sentence by Robert Johnson.

Why must the condemned man in the electric chair die in darkness? They put a black mask before his face.

Is it to keep him from seeing where he is going?

Well, said the prison official matter-of-factly, the 2000 volt jolt at 8-to-10 amps makes his brain reach the boiling point of water, and the body gets to smoking and pretty charred up.

"You can just imagine what happens to the face."

So the mask is not for the benefit of the dying man, but out of consideration for the feelings of the witnesses required by law.

WHY ANONYMOUS?

Why must the executioner be anonymous? Is there anything about his calling of which he should be ashamed?

The soft, infinitely concerned voice asking these ques-

tions was that of Joseph N. Welch, the famed Boston attorney who became particularly known for his part in the Army-McCarthy hearings, and the program was Omnibus, which returned Sunday for its seventh season.

Why must the executioner be ananymous? "We like to think it is some impersonal thing called the State," Welch said. "That is not so—a hand must throw a switch, or push a button, or pull a trap.

"The hand is yours and mine."

At the beginning of the program, parents were warned that parts of it might not be suitable for children. This perhaps drew more children than would normally have watched, and I think this is good. The more people who saw this the better.

Mr. Welch in what was quite probably the most important case of his career—brilliantly prosecuted an idea—capital punishment.

PURPOSEFUL ATTENTON

The arguments on behalf of capital punishment were given attention, but only for the sake of knocking them down. This was a quiet and damning accusation of man for killing part of himself. If parts of it were brutal and morbid, it was because we cannot have any strong conviction about the legal taking of life without knowing some of the facts about it.

This program was the result of months of research, and the words of the prison personnel were actual quotes, although delivered by actors. James Lee, the playwright who wrote the Life of Samuel Johnson production for Omnibus last year, prepared the dramatic vignettes.

Mr. Welch took as his thesis that if the purpose of capital punishment is to deter, we are defeating that purpose by shrouding the manner of it in secrecy.

We should have public executions, he argued in his quiet way, as they did before we became civilized.

Once a Social Outing

In old, uncivilized days, an execution was the excuse for an afternoon's outing. Just 200 years ago in England, a 7-year-old girl was hanged for stealing tuppence ha-penny. In 1839 in this country, a 12-year-old boy was hanged for stealing a sheep. In these enlightened days, we execute no one under 18.

Curiously, at hangings of pickpockets, other pick-pockets industriously plied their trade, waiting for the moment when the crowd's attention was focused on the climactic event and attention diverted.

The death penalty did not seem to be fulfilling its purpose, Mr. Welch said dryly.

Statistics? In this country, there are about 7000 murders annually, and about 7000 different kinds of murderers. The majority are between 21 and 35 and have committed no previous crime. There is usually too much to drink, and the favorite time for murder is between 8 p.m. Saturday and 2 a.m. Sunday.

Reasons for Outbreaks

Some biologists argue that the reason for outbreaks of violence frequently lies in a chemical embalance—too much calcium in the system, perhaps, or too much sugar in the blood.

But the law asks only did the accused know the nature of his act.

Maine, which abolished capital punishment in 1887, has the lowest criminal rate. Georgia, where 14 crimes are punishable by death, has one of the highest.

Seven states have abolished capital punishment. They

are Michigan, 1846; Rhode Island, 1852; Wisconsin, 1853; Maine, 1887; Minnesota, 1911; North Dakota, 1915; Delaware, 1958.

The Oregon Legislature has voted to abolish capital punishment, in unanimous Senate vote, and Oregon will vote on it Nov. 4.

Mr. Welch noted that some states and nations have abolished capital punishment and later restored it.

SOME RESTORED IT

Italy restored it, he said, under Mussolini.

Austria restored it, under Hitler, who put the executioner in a high silk hat.

Soviet Russia restored it—"and in 1954."

Mr. Welch said: "Look about you and see who is on your side."

Right up to the last moment, condemned men refuse to abandon hope. At the last moment, they ask for a piece of paper and a pencil and they scribble something like: "I am innocent." They think that will save them.

"Nobody believes it can happen * * * and there goes your deterrent."

In the gas chamber, they try as long as possible to keep from taking that last breath.

In less enlightened days, men were pressed to death under weights, starved slowly on slops, drawn and quartered, burned to death.

"We have become merciful," said Mr. Welch.

This was one of the most horrible and most beautifully compassionate programs I have ever seen.

Broadcast by Chet Huntley, NBC News, with Emphasis . . . Plain Talk, March 8, 1965.

The Death Penalty.

There is a chance that before this year is out, capital punishment in the United States will be on its way out * * * relegated to an unenlightened and semi-barbaric past. The State of Iowa recently set it aside. The State of Indiana may do so sometime this spring. If Indiana should give up capital punishment, it would be the 11th state to do so. Leaders of the New York State legislature have declared that there is a good chance capital punishment will be outlawed before the year is finished. Gov. Rockefeller recently hinted that he would look upon such a bill with some sympathy. Although legislation to put aside capital punishment has been narrowly defeated on several recent occasions in the legislature of California, the opponents of it are rallying for another try. Governor Brown of California is strongly in favor of its elimination and the judiciary of California is overwhelmingly demanding that the practice be dropped.

There is no question but what there is a new revulsion against the death penalty as a function of our system of justice. We simply are not executing criminals as we did formerly. There are today 21 persons awaiting execution in New York's Sing Sing prison. There are about an equal number in Death Row at California's San Quentin. Some of these men have been under sentence of death for as long as six or seven years. Charles Glinton has been in Sing Sing's version of death row for six years. His date of execution is now set for this coming April 1st. It could well be that the Governor will stay the execution, at least, until the state legislature determines whether or not it will take action upon a bill this year to outlaw capital punishment.

Another wave of revulsion against the death penalty must have swept through this country recently when a confession of brutal murder, extracted from a New York youth, turned out to be false and invalid. It occurred to many that if the state had been given a little more time it might have sent him to the electric chair to find out later that it had killed an innocent man.

The evidence is virtually conclusive that the death penalty is not a deterrent to crime. It is costly and degrading. The admonition "Thou shalt not kill" has no qualifications to the end that society may ask itself by what rule does it secure justification for the taking of human life.

The best known and most respected penologist of this country, Clinton Duffy, former warden of San Quentin, says the death penalty is such a consummate waste, because in every man, no matter how immoral or degraded or cruel, there is some value which he can render to the society he has wronged.

The American Civil Liberties Union Statement on The Death Penalty & Civil Liberties.

THE AMERICAN CIVIL LIBERTIES UNION believes that capital punishment is so inconsistent with the underlying values of a democratic system that the imposition of the death penalty for any crime is a denial of civil liberties. We believe that past decisions to the contrary are in error, and we will seek the repeal of existing laws imposing the death penalty and the reversal of convictions carrying a sentence of death.

Capital Punishment in Operation Results in Denial of Equal Protection of the Law.

The existence of the death penalty for crimes results in discrimination against the poor, the uneducated and the Negro. In the last three and one-half decades, 53.7 per cent of all persons executed in the United states have been Negroes, even though Negroes represent only 10 per cent of the population. The discrimination is even clearer when comparison is made of the imposition of the death penalty upon those convicted of a capital crime. A study of a northern state (Ohio) shows that 78 per cent of all Negroes so convicted were executed, but only 51 per cent of whites so convicted were executed.

The disproportionately large number of executions of members of the Negro race indicates that this penalty is often imposed as the result of racial bias. Certainly no statute could require that the death penalty be imposed upon a Negro, but not upon a white person, because such provision would be a denial of equal protection of the law. A law which permits such a result is also an unconstitutional denial of equal protection of the law.

There is also evidence of a compelling nature that the death penalty is more likely to be imposed upon one

who is poor, regardless of his race, than upon one who has significant financial resources. For example, a rich man accused of a crime may avoid the death penalty by employing legal counsel and compensating him fully for the extensive time necessary to pursue the mutiple remedies available to those under penalty of death. A poor man, while given the right to counsel, has only that counsel which is volunteered, or which is either compelled or compensated by the state. While such publicly provided counsel is almost always dedicated, it is unrealistic to believe that such counsel can give the kind, range and detail of service which can come from those compensated at the usual rate paid the most competent lawyers of our time. To make punishment of the irrevocable and final nature of death depend upon the availability of funds is clearly a denial of equal protection to the man whose funds are inadequate or nonexistent.

In the case of capital punishment today, the punishment does not fit the crime. It is instead punishment directed almost exclusively to the most disadvantaged members of society. Capital punishment is in fact, therefore, a constitutionally prohibited denial of equal protection of the laws.

IMPOSITION OF THE DEATH PENALTY FOR COMMISSION OF A CRIME IS CRUEL AND UNUSUAL PUNISHMENT.

Although the Supreme Court has in the past said that "the punishment of death is not cruel, within the meaning of that word as used in the Constitution" (*In Re Kemmler*, 119 U. S. 436 at 447), we believe the time has come to reassess this judgment. As the late Mr. Justice Burton said in his dissent in *Francis v. Resweber*, 329 U. S. 459 at 472, "Abhorrence of the cruelty of ancient

forms of capital punishment has increased steadily until, today, some states have prohibited capital punishment altogether."

The fact that capital punishment has been acceptable in the past is no reason for its continuation. The rack and the screw; drawing and quartering; flogging—all have been used and subsequently rejected as maturing and sensitive notions of the essential commands of human decency demonstrated the barbarity of the practices.

Certainly evolving standards of decency that mark the progress of maturing society have led to a reexamination of the assumption, so long made, that capital punishment does not violate the Eighth and Fourteenth Amendments to the Constitution. The Supreme Court acknowledged in *Weems v. United States*, 217 U. S. 349, that the Eighth Amendment is dynamic in its meaning, not static. The Court said, "Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth."

To ask today the question whether the imposition of the death penalty is cruel is to answer it. Anglo-American law, and indeed much of human experience, has been devoted to postponement of death. So committed is the society to the maintenance of life that it does not permit the life of a hopeless invalid to be taken in order to end the greatest of pain. If society's respect for life denies men the right to take life in order to prevent or end pain, or because one is tired of life, surely the state should not be permitted to take a life in order to punish for past behavior.

General public abhorrence of the death penalty is manifest in the reduction of the number of executions each year. So repugnant has the death penalty become

that twelve states have either outlawed or narrowly limited the imposition of the death penalty.

Contemporary discomfort with the death penalty is further revealed by the reversal of guilty verdicts for technical errors which to laymen and lawyers both seem simply to reflect the courts' apprehension that to permit the judgment to stand would result in the ending of a life.

To retain the theory that imposition of the death penalty is not cruel is to ignore the persistence of individual and collective conscience which says that death imposed by the force of the state is the ultimate cruelty insofar as the person whose life is taken is concerned.

Because the poor man and the member of the minority group are the most likely to be the victims of a death penalty, the punishment is, as to the rest of the society, not only cruel, but also unusual. It is, for most members of the society, a punishment that the society for reasons of conscience refuses to inflict.

We believe, therefore, that contemporary notions of the significance of human life make imposition of the death penalty cruel and unusual punishment prohibited by the Constitution of the United States.

IMPOSITION OF THE DEATH PENALTY IS A DENIAL OF DUE PROCESS OF LAW BECAUSE OF FUNDAMENTAL UNFAIRNESS.

The irreversibility of the death penalty means that error discovered after the penalty has been imposed cannot be corrected. Thus one who suffers the death penalty, and subsequently is found to have been improperly convicted, has been denied due process of law.

In one sense, moreover, the death penalty is in and of itself a denial of due process. Life is the *sine qua non* of the right to due process. A dead man cannot be given due process. A dead man has no rights. The right to have rights—the right to due process—depends upon the exist-

ence of life. The state should not be permitted to deprive the citizen of all rights—including the right to have rights—by taking his life for any reason.

In addition, the operational facts surrounding the imposition of the death penalty reveal fundamental unfairness to the interests of one accused of a capital crime. For example, jury panels in capital cases are selected partly on the basis of a belief in the death penalty. A juror opposed to the death penalty may be struck from the jury panel, so that the state is protected from a jury biased against the death penalty, but the defendant is not protected against a jury biased in favor of the death penalty. Such bias on the side of the state in taking a human life is fundamentally unfair.

The existence of the death penalty also has a deleterious effect on the administration of justice, which prejudices the defendant. The incentive of a capital conviction often produces police lawlessness in the use of the "third degree" and other forms of coercion in order to obtain confessions or evidence for the prosecution. Similarly the zealous prosecutor in capital cases tends not merely to argue the evidence of guilt or innocence, but to advocate the need to exterminate the accused, hardly an objective pursuit of justice. And the blatant, emotional and detailed coverage given by the mass media to capital crimes, eagerly digested by the public, can make a fair trial almost impossible.

There is the further special problem in capital cases raised by the negotiating process frequently carried on between the prosecution and the defense in all criminal cases. For the defendant to make a "rational" decision when he bargains with the prosecution, the issue is not whether he is in fact "innocent" or "guilty" but rather what is the *probability* that he will be found guilty or not guilty. Thus, the innocent defendant cannot afford to

dismiss the negotiating process without taking a cold and calculating look at the strength and weakness of his case as it will be viewed by the court and jury. The defendant who is "guilty" must do the same. And so must the defendant who knows not whether he is "innocent" or "guilty."

In capital cases this dilemma is especially grisly because the defendant's life is at stake, and the pressure to make a deal with the prosecution may be irresistible even though the defendant is innocent. This is hardly conducive to the fairness we expect of our judicial system.

Capital Punishment Not Acceptable in Light of Present-Day Standards of Justice and Humanity.

Underlying all of the foregoing considerations is the judgment of the American Civil Liberties Union that the imposition of death as punishment for a crime, regardless of the nature of the crime, is inconsistent with today's standards of justice. Because we believe the death penalty to be an injustice in practice and in concept, we also believe that it is—and will one day be declared to be—unconstitutional. We believe that the death penalty is inconsistent with the underlying values of the Constitution of the United States—the protection of the pursuit of life, liberty and happiness of the citizenry—and is therefore a denial of due process.

Legislative and Executive Action to Be Sought.

The American Civil Liberties Union will seek elimination of the death penalty not only through the courts, but also through legislative action to repeal existing capital punishment statutes. In addition, we shall seek, as a matter of civil liberties concern, the commutation of death sentences, until such time as the death penalty is eliminated as a part of the law and practice of the United States.

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OCTOBER TERM, 1966.

No. 476.

JOHN ELMER WOODARDS,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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